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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1054.

ROBERT L. WHARTON, APPELLANT,

vs.

JOHN H. WISE, SHERIFF OF ACCOMACK COUNTY, VIRGINIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED OCTOBER 30, 1893.

(15,438.)

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1 In the Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte ROBERT L. WHARTON: On Petition for Writ of *Habeas Corpus.*

Be it remembered that heretofore, to wit, on the 6th day of May, A. D. 1893, came the petitioner and presented to the court his petition for the writ of *habeas corpus*, which petition, together with the affidavit thereto and the exhibits therewith, *are* in the words and figures following, to wit:

Petition.

To the honorable the judge of the circuit court of the United States for the 4th circuit:

The petition of Robert L. Wharton and Severn Nelson respectfully shows—

(1.) That they are severally and have for a long time been *bona fide* citizens of the State of Maryland, residing in Somerset county, in said State.

(2.) That on the 28th day of March, 1785, the States of Maryland and Virginia entered into a compact "to regulate and settle the jurisdiction and navigation of the Potomac and Pocomoke rivers and that part of Chesapeake bay which lyeth within the territory of Virginia, and which compact was afterwards ratified by the Congress of the United States in ratifying the compact between the two States, settling their boundaries in what is known as the Black-Jenkins award (see act of Congress, Statutes at Large, 1879, p. 483, chapter 196).

(3.) That by the seventh section of said compact it is provided as follows:

2 "The citizens of each State respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both States, provided that such common right be not exercised by the citizens of the one State to the hindrance or disturbance of the fisheries on the shores of the other State, and that the citizens of neither State shall have the right to fish with nets or seines on the shores of the other."

And that by the eighth section of said compact it is provided as follows:

"All laws and regulations which may be necessary for the preservation of fish or for the performance of quarantine in the River Potowmack or for preserving and keeping open the channel and navigation thereof or of the River Pocomoke within the limits of

Virginia by preventing the throwing out ballast or giving any other obstruction thereto shall be made with the mutual consent and approbation of both States."

That by the true interpretation of said seventh and eighth sections of said compact the citizens of Maryland are lawfully entitled to possess and enjoy and exercise a common right of fishery, including the right to catch and take oysters, in the Potomac river and in the Pocomoke river, including what is also called Pocomoke sound, which is a part of said river, being in fact really the mouth thereof; that said right of fishery in common in the said
3 Potomac river and in the said Pocomoke river and Pocomoke sound, as a part of said river, has been recognized and conceded by the State of Virginia by repeated acts of her legislature, and, as your petitioners are informed and believe, has not been disputed until within the last few years.

(4.) That by the tenth section of said compact it was covenanted and agreed between said States that—

"All piracies, crimes, or offences committed in that part of Chesapeake bay which lies within the limits of Virginia or that part of the said bay where the line of division from the south point of the Potowmack river (now called Smith's point) to Walkins point, near the mouth of Pocomoke river, may be doubtful and on that part of Pocomoke river within the limits of Virginia or where the line of division between the two States upon the said river is doubtful by any persons not citizens of the Commonwealth of Virginia against the citizens of Maryland shall be tried in the court of the State of Maryland which hath legal cognizance of such offence; and all piracies, crimes, or offences committed on the before-mentioned parts of Chesapeake bay and Pocomoke river by any persons not citizens of Maryland against any citizen of Virginia shall be tried in the court of the Commonwealth of Virginia which
4 hath legal cognizance of such offence. All piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river by persons not citizens of either States shall be tried in the court of the Commonwealth of Virginia having legal cognizance of such offences; and all piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river by any citizen of the Commonwealth of Virginia or of the State of Maryland, either against the other, shall be tried in the court of that State of which the offender is a citizen. The jurisdiction of each State over the River Potowmack shall be exercised in the same manner as is prescribed for the before-mentioned parts of Chesapeake bay and Pocomoke river in every respect except in the case of piracies, crimes, and offences committed by persons not citizens of either State, in which case the offenders shall be tried by the court of the State to which they shall first be brought; and if the inhabitants of either State shall commit any violence, injury, or trespass to or upon the property or lands of the other adjacent to the said bay or rivers or to any persons upon such lands, upon proof of due notice to the offender to appear and answer any court of record or civil magistrate of the State where the offence shall have been com-

mitted having jurisdiction thereof may enter the appearance of such person and proceed to trial and judgment in the same manner as if legal process had been served on such offender, and such judgment shall be valid and effectual against the person and property of such offender, both in the State where the offence shall have been com-
mitted and also in the State where the said offender may re-
5 side, and execution may be issued by the court or magistrate
giving such judgment in the same manner as upon judgments given in other cases, or upon a transcript of such judgment, properly authenticated, being produced to any court or magistrate of the State where such offender may reside, having jurisdiction within the said State or county where the offender may reside, in cases of a similar nature, such court or magistrate shall order execution to issue upon such authenticated judgment in the same manner and to the same extent as if the judgment had been given by the court or magistrate to which such transcript shall be exhibited."

(5.) That said compact has never been rescinded, abrogated, or annulled, but is still a subsisting and valid agreement, binding upon and enforceable by the said States of Maryland and Virginia, except so far as modified by the subsequent adoption of the Constitution of the United States and the respective citizens thereof, so far as the said seventh, eighth, and tenth sections thereof are concerned; and your petitioners are advised and therefore charge that as citizens of Maryland they were and still are entitled to the full benefit and protection of the said compact, and especially of the said seventh, eighth, and tenth sections thereof, hereinbefore recited.

(6.) That on the 27th day of March, 1893, at the March term of the county court of Accomack county, in the State of Virginia, your petitioners were severally indicted by the grand jury of said county, for that on the 24th day of February, 1893, your petitioners did
unlawfully take and catch oysters in the waters of Virginia
6 and within the jurisdiction of said county, on Ledge rock,
in Pocomoke sound, as will appear by a true copy of one of said indictments filed as a part of this petition, marked "Indictment."

(7.) That on the 26th day of April, 1893, your petitioners were put upon their trial in said court upon said indictments, and at said trial they severally, in proper person, filed the following plea, to wit:

"The traverser, in his own proper person, says that at the time of the alleged offence charged in the indictment the traverser was and still is a *bona fide* citizen of the State of Maryland, residing in Somerset county, of said State, and that the act of assembly of the Commonwealth of Virginia under which the indictment is found against him has not been adopted, sanctioned, ratified, or confirmed by the General Assembly of Maryland, and so the traverser says that under and by virtue of a public agreement between the Commonwealth of Virginia and the State of Maryland, duly entered into between said two States and commonly known as the compact of 1785 between Virginia and Maryland, which said compact, the traverser says, has never been repealed, abrogated, re-

scinded, or annulled, but which is still in fact a subsisting and
operative compact between said two States, this court has no ju-
risdiction to try the traverser for and concerning the said al-
leged offence in said indictment charged, the Pocomoke sound
in said indictment mentioned being in fact a part of the
Pocomoke river in said compact referred to;" that the Com-
monwealth of Virginia demurred to the said plea, alleging
that "the said plea is not sufficient in law;" that upon issue
joined on said demurrer the court sustained the de-
7 murrer and adjudged the plea insufficient; that thereupon
your petitioners severally pleaded not guilty, upon which
plea issue was joined in each of their respective cases and a jury em-
panelled to try them, upon which trial the jury returned a verdict of
guilty against them as charged in the indictment; that thereupon
your petitioners severally moved the court to set aside the said ver-
dict and to grant them a new trial upon the grounds "that the said
verdict was contrary to the evidence and contrary to the law and
because of error in the court in sustaining the demurrer of the Com-
monwealth to said hereinbefore-recited plea of the traverser;" that
the court overruled the said motions of your petitioners, and there-
upon proceeded to sentence and did sentence your petitioners to pay
a fine of five hundred dollars each and the costs of said prosecution
and that your petitioners be severally committed to the jail of said
county until they shall have respectively paid the fine and costs afore-
said or be discharged by due course of law; that thereupon your peti-
tioners, alleging that they feel severally aggrieved by the judgment
aforesaid and that they severally intend to apply to the circuit court
of said county of Accomack for a writ of error to the same, moved
the court to admit them severally to bail pending their appeal to
appear and abide by said judgment, which motion was refused by
the court because the law of Virginia does not provide for admit-
ting a person to bail after being convicted; that thereupon your
petitioners, in default of the payment of said fine and costs,
8 were committed to said jail of Accomack county, in which said
jail they are now detained by virtue of said judgment; all
of which will appear by duly certified copies of the record in their
several cases filed herewith and prayed to be taken as part of this
petition, marked respectively "Record Wharton" and "Record
Nelson."

(8.) Your petitioners are advised and therefore charge that the said act of the Commonwealth of Virginia under which they were indicted was and is null and void because the same has never been ratified and confirmed by concurrent legislation of the State of Maryland; that as *bona fide* citizens of Maryland they were not liable to be tried, found guilty, and punished under the said indictments, for the reason that by the true interpretation of the said compact between Virginia and Maryland the alleged offence charged in the indictments against them respectively is exclusively cognizable, so far as citizens of Maryland are concerned, in the courts of Maryland.

(9.) Your petitioners further charge that the statute of Virginia

under and by which they were so indicted, tried, convicted, sentenced, and are now detained and imprisoned in said Accomack county jail, violates and impairs the obligation of the contract between the two States of Maryland and Virginia made by the said compact of 1785, and is therefore null and void, in this, that whereas by the true interpretation of said compact your petitioners, as citizens of Maryland, are lawfully entitled, as hereinbefore stated, to a right of fishery, including the right to catch and take oysters, in common with citizens of Virginia, in Pocomoke river,
9 including Pocomoke sound as a part thereof, said statute denies to your petitioners such lawful right and imposes a penalty upon your petitioners for exercising said right, and so your petitioners aver that they are severally deprived of their liberty and imprisoned, contrary to the Constitution and laws of the United States.

(10.) That under the decision of the county court for Accomack county, as hereinbefore stated, there is no power under the law of Virginia to admit your petitioners to bail pending a writ of error to the circuit court of Accomack county and thence to the supreme court of appeals of Virginia by your petitioners to procure a review and reversal of said erroneous and void judgment of said Accomack county court, and that consequently they have no remedy to obtain their discharge from said unlawful imprisonment except by means of a writ of *habeas corpus* issued by this honorable court; that in order to obtain their liberty it would be necessary for them to pay said fine of five hundred dollars and costs, and in default of said payment under the law of Virginia they will be imprisoned for six months, and so they show to your honor that if they desire to obtain their freedom they can only do so under and by virtue of a writ of *habeas corpus*, which they now ask of your honor to test the validity of their said sentence and imprisonment, for the obvious reason that before their cases can be heard by the supreme court of appeals of Virginia they will have served out the said term of imprisonment of six months imposed by the law of Virginia in default of a payment of their said fines.

10 (11.) Your petitioners therefore pray your honor to grant to them the writ of *habeas corpus* directed to John H. Wise, Esq., sheriff of said Accomack county, by whom by virtue of said unlawful and void judgment they are severally imprisoned and deprived of their liberty, ordering and requiring him to produce the bodies of your petitioners respectively before this honorable court, together with the authority for their detention, on some day to be named in said writ.

And, as in duty, &c.

JOHN P. POE,
Attorney General of Maryland,
BRADLEY T. JOHNSON,
Special Counsel for the State,
THOS. S. HODSON,
Att'y- for Petitioners.

STATE OF MARYLAND, } *To wit:*
City of Baltimore, }

I hereby certify that on this 1st day of May, A. D. 1893, before me, the subscriber, clerk of the circuit court of the United States for the district of Maryland, personally appeared Thomas S. Hodson and made oath that the matters and facts set forth in the aforegoing petition are true to the best of his knowledge and belief.

[SEAL.] JAS. W. CHEW,
Clerk of the Circuit Court of the United States
for the District of Maryland.

11 EXHIBIT FILED WITH FOREGOING PETITION.

VIRGINIA.

Pleas held before the court of the county of Accomack, at the court-house thereof, by adjournment, on Wednesday, the 26th day of April, A. D. one thousand eight hundred and ninety-three.

Be it remembered that heretofore, to wit, at a court held in and for the said county of Accomack, at the court-house thereof, on Monday, the 27th day of March, A. D. 1893, Spencer F. Rodgers, foreman; Joseph T. Kenney, Henry E. Byrd, William T. Fletcher, William L. Long, Joseph R. Riggs, Sylvanus W. Parkes, Thomas C. Kellam, John W. Guy, Sen'r, John Lawrence, and Mitchell T. Scarborough were empannelled and sworn a regular grand jury of inquest in and for the body of the said county, and, having received their charge, withdrew to their chamber, and, after some time, returning into court, presented an indictment against Robert L. Wharton, a non-resident, for taking oysters unlawfully, "a true bill;" which indictment is as follows, to wit:

"ACCOMACK COUNTY, *To wit:*

In the County Court of the said County.

The jurors of the Commonwealth of Virginia in and for the body of the county of Accomack and now attending the said court upon their oaths present that Robert L. Wharton, a non-resident of the State of Virginia, on the 24th day of February, A. D. 1893, in the county aforesaid, did unlawfully take and catch oysters in the waters of this State and within the jurisdiction of said county, to wit, on Ledge rock, in Pocomoke sound, against the peace 12 and dignity of the Commonwealth of Virginia.

J. H. FLETCHER, JR.,
Att'y for Com."

Upon the information of J. Riley Marshall, Geo. P. Miles, J. R. Drewer, Noah E. Miles, sent up by the court.

And then came the attorney for the Commonwealth, and thereupon the said Robert L. Wharton, who stood indicted with, being a non-resident of the State of Virginia, having on the 24th day of

February, A. D. 1893, in the said county, unlawfully took and caught oysters in the waters of said State and within the jurisdiction of said county, to wit, on Ledge Rock, in Pocomoke sound, against the peace and dignity of the Commonwealth of Virginia, appeared in court, in accordance with the conditions of his recognizance entered into before the judge of the said court on the 15th day of the then month of March, and was set to the bar by the jailor of the said court; and thereupon, on motion of the said defendant and for reasons appearing to the court, it was ordered that this cause be continued until the third day of the then next term; and thereupon the said defendant applied to the court to be admitted to to bail; which application was granted upon the said Robert L. Wharton, with sufficient surety, entering into a recognizance himself in the penalty of five hundred dollars ($500) and said surety in the like sum of five hundred dollars ($500), to be levied of their respect-
13 ive goods and chattels, lands and tenements, and to the said Commonwealth to be rendered, yet upon condition that if the said Robert L. Wharton should make his personal appearance before the said court at the court-house of the said county on the third day of the then next term of the said court to answer the said indictment and should not depart thence without the leave of the said court, then said recognizance was to be void; otherwise the same was to remain in full force and effect; and thereupon the said Robert L. Wharton, with William C. Hall, his surety, who was deemed sufficient, recognized accordingly, and they each at the same time waived the benefit of their respective homestead exemptions as to said recognizance, and also all right or claim to satisfy any liability to the said Commonwealth arising under said recognizance with coupons detached from the bonds of the State of Virginia; and thereupon the said Robert L. Wharton was discharged from custody.

And now, on this day, to wit, at a court held for the said county of Accomack, at the court-house thereof, by adjournment, on Wednesday the 26th day of April, A. D. one thousand eight hundred and ninety-three, came the attorney for the Commonwealth; and thereupon the said defendant, Robert L. Wharton, who stands indicted with, being a non-resident of the State of Virginia, having on the 24th day of February, A. D. 1893, in the said county, unlawfully took and caught oysters in the waters of the said State and within the jurisdiction of the said county, to wit, on Ledge rock, in Pocomoke sound, against the peace and dignity of the Commonwealth of
14 Virginia, appearing in court, in accordance with the conditions of his recognizance entered into before this court on the 27th day of March last, was set to the bar by the jailor of this court; and thereupon the said defendant in his proper person filed a special plea in writing to the jurisdiction of the court, verified by his affidavit, which special plea the attorney for the Commonwealth says is not sufficient in law, and the said defendant says that his said special plea is sufficient in law; and thereupon, the said demurrer to the said special plea being fully argued, the same was sustained by the court and said special plea considered insufficient, to which

ruling of the court the defendant excepted; whereupon the said defendant says that he is not guilty in manner and form as in the said indictment against him is alleged, and of this puts himself upon the country, and the attorney for the Commonwealth likewise; whereupon came a jury, to wit, Wm. F. Fleming, L. Jas. Gunter, Henry Melton, of P.; James K. Harmon, Edward S. Wise, Edward J. Window, James Almer Goffigon, Jerry F. Garrison, Lafayette W. Groton, Sam'l J. Stevenson, Peter T. H. Ayres, and Fountain B. Humphreys, who, being selected by lot in the manner directed by law from the jurors summoned to attend at this term, were elected, tried, and sworn well and truly to try the issue joined between the attorney for the Commonwealth and the said defendant upon the indictment aforesaid, and, having fully heard the evidence and the arguments of counsel, were sent out of court to consult of their verdict, and after some time, returning into court, returned the following verdict, to wit: "We, the jury, find the defendant guilty." Whereupon
the said defendant moved the court to set aside said
15 verdict and grant him a new trial upon said indictment
upon the grounds, 1st, because the verdict is contrary to the law; 2d, because the verdict is contrary to the evidence, and, 3rd, because of error in the ruling of the court upon the demurrer to the plea to the jurisdiction filed by the traverser, which motion being thereupon fully argued the same was overruled, to which ruling of the court the defendant excepted; therefore it is considered by the court that the Commonwealth do recover against the said defendant five hundred dollars ($500.00), the fine prescribed by law for the said offence, and her costs by her about her prosecution in this behalf expended, and that said defendant be committed to the jail of this county until he shall have paid the fine and costs aforesaid or is discharged by due course of law. Whereupon the said defendant, alleging that he felt himself aggrieved by the judgment aforesaid and that he intended to apply to the circuit court for this county for a writ of error to the same, moved the court to admit him to bail pending his appeal, to appear and abide by said judgment, which motion was refused by the court because the law does not provide for admitting a person to bail after being convicted; and thereupon the said defendant, failing to pay the fine and costs aforesaid, was committed to jail.

MEMORANDUM.—On the trial of this cause the defendant excepted to opinions and rulings of the court given upon the trial, and tendered two bills of exceptions, which were received, signed, and sealed by the court and ordered to be made part of the record of the cause, which two bills of exceptions are as follows, to wit:

16 "At the trial of this case the traverser, in proper person,
filed the following plea to the jurisdiction:

"The traverser, in his own proper person, says that at the time of the alleged offence charged in the indictment the traverser was and still is a *bona fide* citizen of the State of Maryland, residing in Somerset county, of said State, and that the act of assembly of the

Commonwealth of Virginia under which the indictment is found against him has not been adopted, sanctioned, ratified, or confirmed by the General Assembly of Maryland, and so the traverser says that under and by virtue of a public ageement between the Commonwealth of Virginia and the State of Maryland, duly entered into between said two States and commonly known as the compact of 1785 between Virginia and Maryland, which said compact the traverser says has never been repealed, abrogated, rescinded, or annulled, but which is still in fact a subsisting and operative compact between said two States, this court has no jurisdiction to try the traverser for and concerning the said alleged offence in said indictment charged, the Pocomoke sound in said indictment mentioned being in fact a part of the Pocomoke river in said compact referred to.

"ROBERT L. WHARTON."

"Personally appeared in open court, on this 26th day of April, 1893, the traverser, Robert L. Wharton, and made oath in due form of law that the matters and things in the aforegoing plea set out are true in substance and in fact.

Test: M. OLDHAN, JR., *Clerk*."

And the Commonwealth filed the following demurrer:

17 "And hereupon the said attorney for the Commonwealth, on behalf of the said Commonwealth, says that the said plea by the said defendant above pleaded is not sufficient in law.

JAMES H. FLETCHER, JR.,
(*Att'y for Com'th.*)"

Thereupon issue was joined upon such demurrer, and the court sustained the demurrer and adjudged the plea insufficient.

To which ruling of the court the traverser excepted, and prayed the court to sign and seal this his first bill of exceptions, which is accordingly done this 26th day of April, 1893.

J. W. GILLETT, *Judge*. [SEAL.]

After the matters and things stated in the first bill of exceptions, which is hereby made a part hereof, the traverser filed a plea of not guilty, upon which issue was joined.

And thereupon the Commonwealth proved by sundry competent witnesses that the traverser was, on the 24th day of February, 1893, a non-resident of the State of Virginia, he being then a citizen and resident of Maryland, and that on said day he did take and catch oysters from Ledge rock, in Pocomoke sound, within Accomack county, Virginia.

Thereupon the jury rendered a verdict of guilty.

And thereupon the traverser filed the following motion to set aside the verdict and grant a new trial.

(See motion on page 6 of this transcript.)

And the court overruled the motion.

To which ruling of the court the traverser excepted and
18 prayed the court to sign and seal this his second bill of exceptions, which is accordingly done this 26th day of April, 1893.

J. W. GILLETT, *Judge.* [SEAL.]

The foregoing is a true transcript of the record, and I further certify that by a writing duly filed in said record it appears that the defendant, by his counsel, gave due notice to James H. Fletcher, Jr., attorney for the Commonwealth for the county of Accomack, Virginia, of his intention to apply for said transcript.

Test: MONTCALM OLDHAM, JR., *Clerk.*

Order on Foregoing Petition.

Ordered the fifth day of May, A. D. 1893, on the aforegoing petition, by the circuit court of the United States for the fourth circuit, that the writ of *habeas corpus* issue as prayed, and that the same be made returnable before the circuit court of the United States for the eastern district of Virginia, at Norfolk, on Thursday, the eleventh day of May, 1893, at 12 o'clock m.

N. GOFF, *Circuit Judge.*

To the clerk of the circuit court of the United States for the eastern district of Virginia.

And thereupon, on the said 6th day of May, 1893, the writ of *habeas corpus*, as above commanded, issued from the clerk's office of said circuit court. Said writ, together with the marshal's return thereon, is as follows:

19 *Habeas Corpus.*

CIRCUIT COURT OF THE UNITED STATES, }
Eastern District of Virginia, } *ss:*

The President of the United States of America to John H. Wise, Esq., sheriff of Accomack county, State of Virginia, Greeting:

We command you that the body of Robert L. Wharton, detained by you and under your custody, as it is said, by whatsoever name he may be called, together with the day and cause of his being taken and detained, you have before the honorable the circuit court of the United States for the eastern district of Virginia, at the United States court-room, in the city of Norfolk, Virginia, on Thursday, the 11th day of May, A. D. 1893, at 12 o'cl'k m., to do, submit to, and receive all and singular those things which shall then and there be considered of him in this behalf.

And have you then and there this writ.

Seal United States Circuit Court, Eastern District of Virginia.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Richmond, Virginia, this 6th day of May, A. D. 1893, and of our Independence the 117th year.

M. F. PLEASANTS, *Clerk.*

Marshal's Return.

Executed May 9th, 1893, by serving a certified copy of within order, on petition of Robert L. Wharton, on John H. Wise, the 20 sheriff of Accomack county, Virginia, at his residence, in the county aforesaid.

C. C. CLARKE,
U. S. Marshal,
By E. R. EASTWOOD, *D'p'ty.*

And at another day, to wit, at a circuit court of the United States in and for the eastern district of Virginia, held at Norfolk, in said district, on the 11th day of May, 1893, the following order was entered, to wit:

Ordered by the court the 11th day of May, 1893, that the return of the writ of *habeas corpus,* on petition of Robert L. Wharton be set for hearing at the U. S. court-rooms in Richmond, Virginia, at 12 m. on the 1st day of June next, and that petitioner furnish copies of these proceedings to the attorney general of Virginia and Commonwealth's attorney for Accomack county ten days before said day, and that the petitioner be admitted to bail in the sum of $1,000 for his appearance at said time and place.

RO. W. HUGHES, *Judge.*

And on the same day, to wit, on the 11th day of May, 1893, the said Robert L. Wharton, in accordance with the terms of the above order, entered into and filed in the clerk's office of said circuit court a recognizance, which is in the words and figures following, to wit:

Know all men by these presents that whereas Robert L. Wharton stands charged with violation of an act of the General 21 Assembly of Virginia for taking oysters in Virginia waters unlawfully; and whereas he now wishes to be released from custody:

Know all men by these presents that the said Robert L. Wharton and John T. White are indebted to the United States of America each in the sum of one thousand dollars, conditioned for the appearance of the said Robert L. Wharton at the United States court-room in Richmond, Virginia, before the circuit court of the United States for the eastern district of Virginia, on the first day of June next. The condition of the above obligation is such that if the said Robert L. Wharton do appear at said place and time as above set out, then the above obligation to be null and void; otherwise to be in full force and virtue.

Witness our hands and seals.

ROBERT L. WHARTON. [SEAL.]
JOHN T. WHITE. [SEAL.]

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 1st day of June, 1893, the following order was entered, viz:

Robert L. Wharton, the petitioner in this case, who has heretofore entered into recognizance in the sum of $1,000.00 to appear before this court this day, was this day solemnly called, but came not. Thereupon it is ordered that the said recognizance be, and the same is hereby, declared forfeited.

22 And at another day, to wit, on the 13th day of June, 1893, came John H. Wise, sheriff of Accomack county, Virginia, and filed in open court his return to the writ of *habeas corpus* heretofore issued in this cause; which said return is as follows, to wit:

Sheriff's Return to Writ.

In obedience to this writ I herewith produce the body of the within-named Robert L. Wharton, who has been detained by me in the jail of Accomack county, Virginia, since the 26th day of April, 1893. As the cause of his detention I append hereto, as a part of this return, a copy of the judgment of the county court of said county, made on the said 26th day of April, assessing upon said Wharton a fine of five hundred dollars ($500.00) and the Commonwealth of Virginia's costs of prosecution and committing him to said jail until said fine and costs should be paid. Said fine and costs still remain unpaid, and he is detained for no other cause.

JNO. H. WISE,
Sheriff & Jailor of Accomack Co., Va.

EXHIBIT WITH FOREGOING RETURN.

VIRGINIA:

At a court held for the county of Accomack, at the court-house thereof, on the 26th day of April, A. D. 1893.

THE COMMONWEALTH, Pl't'ff,
against
ROBERT L. WHARTON, Def't.
} On an Indictment.

23 This day came the attorney for the Commonwealth; and thereupon the said defendant, Robert L. Wharton, who stands indicted with, being a non-resident of the State of Virginia, having on the 24th day of February, A. D. 1893, in this county, unlawfully took and caught oysters in the waters of this State and within the jurisdiction of this county, to wit, on Ledge rock, in Pocomoke sound, against the peace and dignity of the Commonwealth of Virginia, appearing in court, in accordance with the conditions of his recognizance entered into before this court on the 27th day of March last, was set to the bar by the jailor of this court; and thereupon the said defendant, in his proper person, filed a special plea in writing to the jurisdiction of the court, verified by his affidavit, which special plea the attorney for the Commonwealth says is not sufficient in law, and the said defendant says that his said special plea

is sufficient in law; and thereupon the said demurrer to the said
special plea being fully argued the same was sustained by the court
and said special plea considered insufficient; to which ruling of the
court the defendant excepted; whereupon the said defendant says
that he is not guilty in manner and form as in the said indictment
against him is alleged, and of this puts himself upon the country,
and the attorney for the Commonwealth likewise. Whereupon
came a jury, to wit, Wm. F. Fleming, L. Jas. Gunter, Henry Melson,
of P.; James K. Harmon, Edward S. Wise, Edward J. Window,
James Almer Goffigon, Berry F. Garrison, Lafayette W. Groton,
Saml J. Stevenson, Peter T. H. Ayres, and Fountain B. Humphreys,
who, being duly selected by lot in the manner directed by
24 law from the jurors summoned to attend at this term, were
elected, tried, and sworn well and truly to try the issue joined
between the Commonwealth and the said defendant upon the indictment
aforesaid, and, having fully heard the evidence and the
arguments of counsel, were sent out of court to consult of their verdict,
and after some time, returning into court, returned the following
verdict, to wit: "We, the jury, find the defendant guilty."
Whereupon the said defendant moved the court to set asid said
verdict and grant him a new trial upon said indictment upon the
grounds, 1st, because the verdict is contrary to the law; 2d, because
the verdict is contrary to the evidence, and, 3rd, because of
error in the ruling of the court upon the demurrer to the plea to
the jurisdiction filed by the traverser; which motion being thereupon
fully argued the same was overruled; to which ruling of the
court the defendant excepted. Therefore it is considered by the
court that the Commonwealth do recover against the said defendant
five hundred dollars ($500.00), the fine prescribed by law for the
said offence, and her costs by her about her prosecution in this behalf
expended, and that said defendant be committed to the jail of
this county until he shall have paid the fine and costs aforesaid or
is discharged by due course of law. Whereupon the said defendant,
alleging that he felt himself aggrieved by the judgment aforesaid
and that he intended to apply to the circuit court for this
county for a writ of error to the same, moved the court to admit
him to bail pending his appeal to appear and abide by said
25 judgment; which motion was refused by the court because
the law does not provide for admitting a person to bail after
being convicted; and thereupon the said defendant, failing to pay
the fine and costs aforesaid, was committed to jail.

MEMORANDUM.—On the trial of this cause the defendant excepted to opinions and rulings of the court given upon the trial and tendered two bills of exceptions, which were received, signed, and sealed by the court and ordered to be made part of the record of the cause.

Commonwealth's Costs of Prosecution.

Clerk	$7 14
Sheriff	1 80
Attorney for Commonwealth	5 00
Witnesses	19 20

Jailor to be added.
Copies.
Test: M. OLDHAM, Jr., *Clerk.*

And on the same day, to wit, on the 13th day of June, 1893, came the petitioner, by counsel, and filed his demurrer to the foregoing return of the sheriff to the writ in this cause, which demurrer is as follows, to wit:

And now comes the petitioner, Robert L. Wharton, and, by John P. Poe, attorney general of Maryland; Bradley T. Johnson, special counsel of Maryland, and Thomas S. Hodson, attorneys for the petitioner, says that the return is insufficient in law, and, not-
26 withstanding the said return, it appears by the petition that at the time of the filing thereof he was detained in jail, deprived of his liberty, and imprisoned, contrary to and in violation of the Constitution and laws of the United States, and that the said return shows no reason sufficient in law why upon the writ of *habeas corpus* prayed for by him and issued by this court he shall not be discharged from custody.

JOHN P. POE,
Att'y Gen'l of Md.,
BRADLEY T. JOHNSON,
THOS. S. HODSON,
Att'ys for the Petitioner.

And thereupon, on the same day, to wit, on the 13th day of June, 1893, the petitioner, by his counsel, filed a list of documents to be submitted as evidence in this cause on behalf of petitioner. Said list is as follows, to wit:

Documents Filed by Robert L. Wharton, Petitioner, to be also Used in the Case of William Marsh and Severn Nelson, in the Circuit Court of the U. S. for the Eastern District of Virginia.

1st. Patent of Hill's Folly.
2nd. " Bay Bush Hall.
3rd. " Littleworth.
4th. " Hodson's Desire.
5th. Map from Jefferson's Notes on Virginia.
6th. Certified copy of map filed with award of Black and Jenkins.
7th. Maryland senate documents, session of 1874, doc. E.
27 8th. 2 affidavits of Joseph Byrd.
9th. 2 affidavits from Accomack C. H.

JOHN P. POE,
BRADLEY T. JOHNSON,
THOS. S. HODSON,
Counsel for Petitioners.

The aforementioned papers are here omitted in pursuance of the following agreement of counsel filed in this cause:

Agreement of Counsel.

It is agreed that in making copy of the record in this case for the Supreme Court of the United States the clerk shall omit from the record the following papers "submitted as evidence:"

1. Patent of Hill's Folly.
2. " " Bay Bush Hall.
3. " " Littleworth.
4. " " Hodson's Desire.
5. Map from Jefferson's Notes on Virginia.
6. Certified copy of map filed with award of Black and Jenkins.
7. Maryland State documents, session of 1874, doc. E.
8. 2 affidavits of Joseph Byrd.
9. 2 do. from Accomack C. H.

And that these papers or any of them may be used in the argument or printed for the use of the court if either party desires so to do.

JOHN P. POE,
28 *Att'y Gen'l of Maryland.*
BRADLEY T. JOHNSON.
R. TAYLOR SCOTT,
Att'y Gen'l of Virginia.

Accompanying the foregoing agreement of counsel is the following letter:

BALTIMORE, *Oct.* 16, 1893.

Hon. R. Taylor Scott.

MY DEAR MR. ATT'Y GEN'L: The within explains itself. There is no use encumbering the record with maps or public documents and we can use them from the books if we choose and think it necessary.

Please sign the agreement and send it to Pleasants to be incorporated in the record.

Y'rs truly, BRADLEY T. JOHNSON.

I write to Richmond also.

And thereupon, on the same day, to wit, on the 13th day of June, 1893, the respondent, the sheriff of Accomack county, Virginia, by his counsel, filed a list of documents to be used as evidence in his behalf as follows, to wit:

Mem. of evidence in behalf of respondent, Jno. H. Wise, sheriff of Accomack county, to wit:

1 & 2. Resolutions of Gen'l Assembly of Virginia passed in
29 June, 1784, and the compact of 1785, ch. 17, Henning's Statute, p. —, to be found in brief of R. Taylor Scott, p-. 7–12.

3. Three old charts, to wit, one in 1690, "A Amsterdam, Chrs. P. Mortier, avec privilege," another of 1776, an old French chart of Chesapeake bay, and Jefferson & Fry map of 1775.

4. Grant to John Carter, dated Oct. 20, 1699.
" " Thomas Wellborne, dated Apr. 4, 1678.
" " Henry Jenkins, " " 25, 1702.
" " Sacker Nelson, " " 4, 1787, & survey.
" " Henry Jenkins, " Apr. 25, 1702.
" " John Taylor, " May 27, 1673.

5. Ancient Md. documents quoted by Judge Gillett, p's 17 & 18, "Appendix 2," R. T. Scott's Brief.

6. Extract from archives of Md., Proceedings of the Council, 1636–1667, p's 197 & 198.

7. Extract from Colonial Papers, vol. VI, No. 58.

8. Baylor's survey of Pocomoke sound.

9. Affidavit of Orris A. Browne.

10. Report and accompanying documents of Va. com'rs to ascertain boundary line bet. Md. and Va.

The evidence referred to in the foregoing list is as follows, to wit:

30

No. 1.

Appendix No. 1.

(1.)

A motion was made that the house do come to the following resolutions:

Whereas, great inconveniences are found to result from the want of some concerted regulations between this State and the State of Maryland, touching the jurisdiction and navigation of the river Potowmack.

Resolved, That George Mason, Edmund Randolph, James Madison, Jun., and Alexander Henderson, Esquires, be appointed commissioners, and that they, or any three of them, do meet such commissioners as may be appointed on the part of Maryland, and in concert with them, frame such liberal and equitable regulations concerning the said river as may be mutually advantageous to the two States; and that they make report thereof to the General Assembly.

Resolved, That the executive be requested to notify the above appointment, with the object of it, to the State of Maryland, and desire its concurrence in the proposition.

Office of Clerk of House of Delegates
and Keeper of the Rolls of Virginia,
May 1st, 1893.

The foregoing is a copy of resolutions agreed to by the General Assembly of Virginia in June, 1784.

J. BELL BIGGER,
C. H. D. & K. of R. of Va.

31

No. 2.

(2.)

Chapter XVII.

An act to approve, confirm, and ratify the compact made by certain commissioners appointed by the General Assembly of the State of Maryland and commissioners appointed by this Commonwealth.

I. Whereas, at a meeting of the commissioners appointed by the General Assembly of the State of Maryland and Virginia, to wit: Daniel of St. Thomas Jenifer, Thomas Stone, and Samuel Chase, Esquires, on the part of the State of Maryland, and George Mason and Alexander Henderson, Esquires, on the part of the State of Virginia, at Mount Vernon, in Virginia, on the 28th day of March, in the year one thousand seven hundred and eighty-five, the following compact was mutually agreed to by the said commissioners:

First. The Commonwealth of Virginia disclaims all right to impose any toll, duty, or charge, prohibition or restraint, on any vessel whatever sailing through the capes of Chesapeake bay to the State of Maryland, or from the said State through the said capes outward bound; and agrees that the waters of Chesapeake bay, and the River Pokomoke, within the limits of Virginia, be forever considered as a common highway, free for the use and navigation of any vessels belonging to the said State of Maryland, or any of its citizens, or carrying on any commerce to or from the said State, or with any of its citizens; and that every such vessel, inward or outward bound, may freely enter any of the rivers within the Commonwealth of Virginia as a harbour, or for safety against an enemy, without the payment of port duties or any other charge; and also, that the before-mentioned parts of Chesapeake bay and Pocomoke river be free for the navigation of vessels from one part of the State of Maryland to another.

Second. The State of Maryland agrees that any vessel belonging to the Commonwealth of Virginia, or any of its citizens, or carrying on commerce to or from the said Commonwealth, or with any of its citizens, may freely enter any of the rivers of the said State of Maryland as a harbour, or for safety against an enemy, without the payment of any port duty or other charge.

Third. Vessels of war, the property of either State, shall not be subject to the payment or any port duty or other charge.

32 Fourth. Vessels not exceeding forty feet keel, nor fifty tons burthen, the property of any citizen of Virginia or Maryland, or of citizens of both States, trading from one State to the other only, and having on board only the produce of the said States, may enter and trade in any part of either State, with a permit from the naval officer of the district from which such vessel departs with her cargo, and shall be subject to no port charges.

Fifth. All merchant vessels (except such as are described in the fourth article) navigating the River Potowmack, shall enter and clear at some naval office on the said river, in one or both States, according to the laws of the State in which the entry shall be made. And where any vessel shall make an entry in both States, such vessel shall be subject to tonnage in each State only in proportion to the commodities carried to, or taken from, such State.

Sixth. The River Potowmack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said States, trading to or from Virginia or Maryland.

Seventh. The citizens of each State, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both States: Provided, that such common right be not exercised by the citizens of the one State to the hindrance or disturbance of the fisheries on the shores of the other State, and that the citizens of neither State shall have a right to fish with nets or seines on the shores of the other.

Eighth. All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the River Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the River Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States.

Ninth. Light-houses, beacons, buoys, or other necessary signals shall be erected, fixed, and maintained upon Chesapeake bay, between the sea and the mouths of the Rivers Potowmack and
33 Pocomoke, and upon the River Potowmack, at the expence of both States. If upon Potowmack river, at the joint and equal charge of both States; and if upon the before-mentioned part of Chesapeake bay, Virginia shall defray five parts and Maryland three parts of such expence, and if this proportion shall in future times be found unequal, the same shall be corrected. And for ascertaining the proper places, mode, and plans for erecting and fixing light-houses, buoys, beacons, and other signals, as aforesaid, both States shall, upon the application of either to the other, appoint an equal number of commissioners, not less than three nor more than five from each State, to meet at such times and places as the said commissioners, or a major part of them, shall judge fit to fix upon the proper places, mode, and plans for erecting and fixing such light-houses, beacons, or other signals, and report the same, with an estimate of the expence, to the legislatures of both States for their approbation.

Tenth. All piracies, crimes, or offences committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack river (now called Smith's point) to Watkins's point,

near the mouth of Pocomoke river, may be doubtful; and on that part of Pocomoke river, within the limits of Virginia, or where the line of division between the two States upon the said river, is doubtful, by any persons not citizens of the Commonwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the State of Maryland which hath legal cognizance of such offence. And all piracies, crimes, and offences committed on the before-mentioned parts of Chesapeake bay and Pocomoke river by any persons not citizens of Maryland against any citizens of Virginia, shall be tried in the court of the Commonwealth of Virginia which hath legal cognizance of such offence. All piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river, by persons not citizens of either State, against persons not citizens of either State, shall be tried in the court of the Commonwealth of Virginia having legal cognizance of such offences: And all piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river, by any citizen of the Commonwealth of Virginia, or of the State of Maryland, either against the other, shall be tried in the court of that State of which the offender is a citizen. The jurisdiction of each State over the River Potowmack shall be exercised in the same manner as is
34 prescribed for the before-mentioned parts of Chesapeake bay
and Pocomoke river in every respect, except in the case of piracies, crimes, and offences committed by persons not citizens of either State, upon persons not citizens of either State, in which case the offenders shall be tried by the court of the State to which they shall first be brought. And if the inhabitants of either State shall commit any violence, injury, or trespass to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any court of record, or civil magistrate of the State where the offence shall have been committed, having jurisdiction thereof, may enter the appearance of such person and proceed to trial and judgment in the same manner as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and propery of such offender, both in the State where the offence shall have been committed and also in the State where the said offender may reside, and execution may be issued by the court or magistrate giving such judgment in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any court or magistrate of the State where such offender may reside, having jurisdiction within the State or county where the offender may reside, in cases of a similar nature, such court or magistrate shall order execution to issue upon such authenticated judgment in the same manner, and to the same extent, as if the judgment had been given by the court or magistrate to which such transcript shall be exhibited.

Eleventh. Any vessel entering into any port on the River Potowmack may be libelled or attached for debt, by process from the State in which such vessel entered. And if the commercial regulations of either State shall be violated by any person carrying on commerce in Potowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board, may be seized by process from the State whose laws are offended in order for trial. And if any person shall fly from justice, in a civil or criminal case, or shall attempt to defraud creditors by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the State from which such person shall fly, or property be removed; and process from the State of Virginia may be served on any part of the said rivers upon any person, or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the State of Maryland may be served on any part of the said rivers upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either State shall attend as witnesses in the other upon a summons from any court or magistrate having jurisdiction, being served by a proper officer of the county where such citizen shall reside.

Twelfth. The citizens of either State having lands in the other, shall have full liberty to transport to their own State, the produce of such lands, or to remove their effects, free from any duty, tax, or charge whatsoever, for the liberty to remove such produce or effects.

Thirteenth. These articles shall be laid before the legislatures of Virginia and Maryland, and their approbation being obtained, shall be confirmed and ratified by a law of each State, never to be repealed or altered by either without the consent of the other.

II. And whereas this General Assembly are of opinion that the said compact is made on just and mutual principles for the true interests of both governments, and the same having been confirmed by the General Assembly of the State of Maryland: Be it therefore enacted, That the said compact is hereby approved, confirmed, and ratified by the General Assembly of Virginia, and that every article, clause, matter, and thing therein contained, shall be obligatory on this State and the citizens thereof, and shall be forever faithfully and inviolably observed and kept by this government and all its citizens, according to the true intent and meaning of the said compact; and the faith and hon*ou*r of this State is hereby solemnly pledged and engaged to the General Assembly of the State of Maryland, and the government and citizens thereof, that this law shall never be repealed, or altered, by the legislature of this Commonwealth, without the consent of the State of Maryland.

No. 3.

The charts referred to are archives of the State of Virginia, and are omitted from this record in pursuance of the agreement of counsel, with leave to counsel to produce them, if necessary, before the court on the hearing of this case.

36 No. 4.

(*Grant to John Carter.*)

To all &c. Whereas &c. Now Know yee, that I the said Francis Nicholson, Esq'r. Gove-nor &c. Do with the advice and consent of the Council of State accordingly give and grant unto John Carter 130 Acres of Land, situate in Accomack County, it being an Island called Foxes North Island, beginning at a marked post standing in the marsh by the Bay side neare the head of the Little Thoroughfair, and thence running Northerly up the Bay to a Sandy Point, and bounded on the West therewith, on the North and East by Sunken Marshes and Islands of Sunken Marshes. The said land being due unto the said John Carter by and for the transportation of 3 persons into the Colony, whose names are to be in the Records mentioned under this Patent. To have and to hold, to be held, &c. Yielding and paying &c. provided &c. Given under my hand and the seal of the Colony this 26th day of October 1699.

FR. NICHOLSON.

Jno. Carter, his patent for 130 acres of land in Accomack county. J. Willson, Fran's Higgs, Isabell Broad.

E. JENNINGS,
Dep'ty Sec't'y.

Book 9, page 230.
Acres, 130.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 21st day of April, 1893.

[SEAL.] W. R. GAINES,
Register of Land Office.

37 No. 4.

(*Grant to Thomas Wellborne.*)

To all &c., Whereas &c., Now know ye that I, Herbert Jeffreys, Esq., Governor &c. give and grant unto Thomas Wellborne 83 Acres of land in Accomack County, on an island in the Bay of Chesapeake and called Fox Island and is the Northern Island to Watts his Island, beginning at the Southermost side of a little Cedar Hammocke on the South end of the said Fox Island and running N. ½° W., along the Western shore of the said Island unto the Northern end of the Northern Hammocke and then by a line drawn above Marsh So. So. E., unto another Hammocke and then along the Eastern side thereof and to a little Hammocke and then by a right line unto the first Beginner. The said land being due by and for the transportation of two persons into this Colony whose names are hereunder written. To have and to hold, &c., Yielding and paying &c. Provided &c. Dated the 4th day of April, 1678.

THOMAS WELBORNE &
JOHN WELBORNE.

Book 6, page 637.
Acres, 83.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 21st of April, 1893.

[SEAL.] W. R. GAINES,
Register Land Office.

38 No. 4.

(Grant to Francis MacKenney & Henry Jenkins.)

To all &c. Whereas &c. Now know ye that I, ye said Francis Nicholson, Esq., Governor &c., do with ye advice and consent of ye Council of State accordingly give and grant unto Francis MacKenney and Henry Jenkins 150 acres of land and marsh in Accomac County on the South end of Watts Island and divided from Walter Taylor his 400 acres by a right line beginning at a marked white oak and pine standing by Pocomoke Sound, thence running West 136 po. to Nanticoke Sound and then on ye Westerne Southerne and Easterne parts surrounded by salt water to ye beginning. The sd. land being due unto the said Francis MacKenney & Henry Jenkins by and for the transportation of three persons into this Colony whose names are to be in the records mentioned under this patent. To have and to hold &c. To be held &c. Yielding and paying &c., provided &c. Given under my hand and ye seal of ye Colony this 25th day of April Anno Dom 1702.

FRA. NICHOLSON.

Francis MacKenney and Henry Jenkins their patent for 150 acres of land in Accomack county.

E. JENNINGS.

Book 9, page 465.
Acres, 150.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 21st day of April, 1893.

[SEAL.] W. R. GAINES,
Register Land Office.

39 No. 4.

(Grant to Sacker Nelson.)

Beverly Randolph, Esquire, Lieut. Governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye, That in Consideration of the Ancient composition of 2 £ 10 s. sterling paid by Sacker Nelson into the Treasury of this Commonwealth there is granted by the said Commonwealth unto Sacker Nelson a certain tract or parcel of land containing 476 acres by survey bearing date the 16th day of August 1773 lying and being in the County of Accomac and Parish of Accomack, Northerly and Easterly on Pocomack Sound, Southerly on the Thoroughfare,

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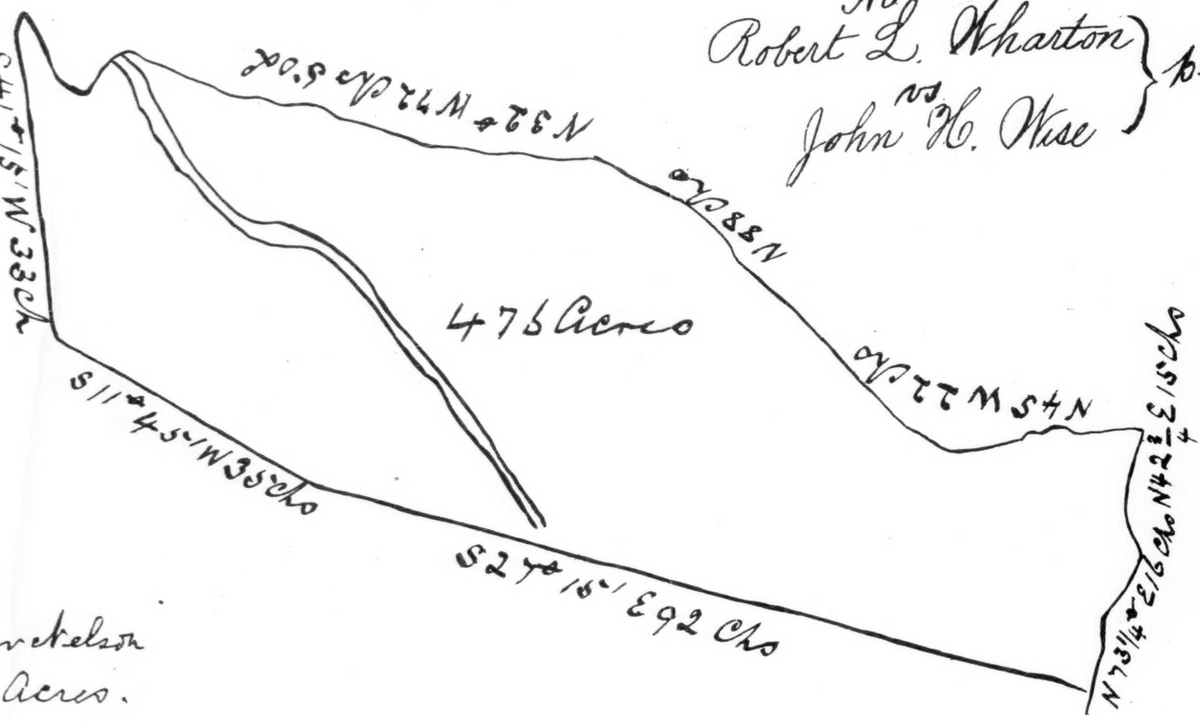
No 1054
Robert L. Wharton } p41
vs
John H. Wise


S 4° 15' W 33 Ch
N 32° W 12 Chs 50 lk
N 88 Chs
476 Acres
N 45 W 22 Chs
N 3 3/4 E 15 Chs
N 42 3/4 Chs
N 73 1/4° E 16
S 11° 45' W 35 Chs
S 27° 18' E 92 Chs

Sacker Nelson
476 Acres.
Accomack Co.
Red 22d Nov.
1784.
Gt iss. 4 May
1787.

Westerly on the Tangers Sound and viz't: Beginning at the Thoroughfare, running thence N. 73¼°, E. 16 po., N. 42¾° E. 15 po., N. 45° W. 22 po. N. 88 po. N. 32° W. 72 po. & 50 links, S. 41¼° W. 33 po. S. 11° 45′ W. 35 po. S. 27¼° E. 92 po., to the beginning with its appurtenances.

Book 11, page 85.

Acres, 476.

To have and to hold the said Tract or Parcel of Land, with its appurtenances to the said Sacker Nelson and his heirs forever.

In witness whereof, the said Beverly Randolph, Esquire, Lieutenant Governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the Lesser Seal of the said Commonwealth
to be affixed at Richmond, on the 4th day of May, in the
40 year of our Lord one thousand 787, and of the Commonwealth the 11th.

[SEAL.] BEVERLY RANDOLPH.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 21st day of April, 1893.

[SEAL.] W. R. GAINES,
Register Land Office.

(Here follows diagram marked p. 41.)

41 ACCOMACK COUNTY, *August 16th*, 1773.

Surveyed for Sacker Nelson 476 acres of land in the parish of Accomack and bounded, to wit: Northerly & easterly on Poromock sound, southerly on the thorofare, westerly on the Tangier sound.

Certified p't me.

THOMAS TEACKLE, *Sur'r.*

I further certify that the variation between the magnetical and true meridian is 3 west.

Book 14, page 196.

Acres, 476.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 21st of April, 1893.

[SEAL.] W. R. GAINES,
Register Land Office.

42 No. 4.

(*Grant to Francis MacKenney & Henry Jenkins.*)

To all &c. Whereas &c. Now know yee that I ye sd. Francis Nicholson, Esq'r., Governor &c., do, with ye advice & consent of ye Council of State accordingly give & grant unto Francis MacKenney & Henry Jenkins 24 acres of land and marsh in Accomack County it being an island called Gabriel's Island als Wats Little Island als Goats Island and separated from Wats Island by Gabriels Straits, whose perpendicular course & distance from ye South end of Wats Island is South West & by South 84 po all ye remaining parts of ye said Island surrounded by the main Bay of Caesapeake, the said land being due unto ye said Francis MacKenney & Henry Jenkins by and for the transportation of one person into this Colony, whose name is to be in ye records mentioned under this patent. To have and to hold &c. to be held &c. Yielding & paying &c., provided &c.

Given under my hand and the seal of the Colony this 25th day of April Anno Dom. 1702.

FRA. NICHOLSON.

Fra. MacKenney & Henry Jenkins their patent for 24 acres of land in Accomack county.

E. JENNINGS.

Book 9, page 465.
Acres, 24.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand & seal of office this 21st day of April, 1893.

W. R. GAINES,
[SEAL.] *Register Land Office.*

43 No. 4.

(*Grant to John Taylor.*)

To all &c. Whereas &c. Now know yee that I ye sd. Sir Wm. Berkeley, Knt. &c., give and grant unto John Taylor 34 acres of land in Accomack it being a little Island called Watts Little Island and lying to ye Southward of Wats Great Island by some called Gabriells Island, being due by transpt. of one person. To have and to hold &c., to be held &c. Yielding &c. Provided &c. Dated ye 27th May, 1673.

Tho: I by. the second tyme.

Book 6, page 458.
Acres, 34.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 21st day of April, 1893.

W. R. GAINES,
[SEAL.] *Register Land Office.*

44 No. 5.

(Ancient Maryland documents referred to in brief of R. Taylor Scott, p's 17, 18, as follows: "The first of these documents is a Maryland one, taken from the Maryland council proceedings, Liber H H, folio 268, and is a commission dated August 22, 1666, directed to certain persons to lay off the county of Somerset, 'bounded on the south by a line drawn from Watkins' point, being the north point of that bay into which the river Wighco (formerly called Wicocomaco and afterwards Pocomoke and now Wicocomaco again) doth fall.'"

"Another ancient document relied upon is one in which both States (then colonies) were equally interested, and which records the action of their respective representatives. It is the report of Phillip Calvert and Edmund Scarborough of the line run by them settling the line of division between the two colonies on the eastern shore. It bears date June 25, 1668, and says: 'After a full and perfect view taken of the point of land made by the north side of Pocomoke bay and south side of Annamessex bay have and do conclude the same to be Watkins' point, from which said point, so called, we have run an east line agreeable with the extremest part of the westermost angle of the said Watkins' point over Pocomoke river to the land near Robert Holston's,'" &c.

The documents above quoted from have been omitted from this record in pursuance of the agreement of counsel heretofore referred to.)

45 No. 6.

(*Extract from Archives of Maryland.*)

Proceedings of the Council of Maryland (page 197).

MARCH 26, 1664.

Appointment of Wm. Coliburne lieutenant by Charles Calvert, Esq., Capt. Genl. all of the forces within this province of Maryland und'r the Rt. Honor'ble Caseilius Absolute, Lord and propry'ry of the same. "I doe hereby constitute, ordaine and appointe you Lieut. und'r Capt. Wm. Thorne of the ffoot Company at pre'nt and to be raised by him betweene Choptanck River and a line drawne East into the mayne ocean from Watkins Point being the North point of the bay into which the *R* River Wighco formerly called Wighcomico, afterwards Pocomoke and now Wighcomico again doth fall, exclusively them to muster exercise & train up in the Art of Warr & discipline Military, &c."

(Immigration from Virginia), same proceedings (198).

MARCH 26, 1664.

A Commission from Charles Calvert nominating, constituting and impowering Stephen Horsey, Capt. Wm. Thorne & Wm. Bosman, gen'em or any two of them being within this province to grant warrants for land during the term of 6 months next ensueing the date hereof upon the Eastern Shore of this province, in any p'te between the Choptanck River & a line Drawne Easte into the maine ocean from Watkins point being the North Point of th't bay into wh'ch the River Wighco (form'rly called Wighcomico afterwards Pocomoke & now Wighcomico again) doth fall exclusively, that is to say, fifty acres for ev'ry p'son transp'tt'd &c.

46 No. 7.

Considerations upon the Patent to the Lord Baltimore dat: 20 Jan'y, Octavo Car. (1632). Colonial Papers Vol. VI. No. 58.

Matter of Law.

5. By the Lord Baltimore's patent, this Election is taken away and part granted to him (viz) from Watkins Point South which is in the 38 degree of latitude to Lawares Bay North which is in the 41 degree of latitude or thereabouts.

Among the documents relating to the settlement of Maryland.

Abstract from Lord Baltimore's Patent (1632).

"All that part of a peninsula lying in the parts of America between the Ocean on the East and the Bay of Chesapeake on the West and divided from the other part thereof by a right line drawn from the promontory or Cape of land called Watkins Point (situate in the aforesaid bay near the River of Wighco) on the West unto, the main ocean on the east; and between that bound on the South unto that part of Delaware Bay on the North which lieth under the 40th degree of Northerly Lat. from the Equinoctial where the New England Ends."

47 No. 8.

(Here follows map.)

48 No. 9.

(*Affidavit of Orris A. Browne.*)

I, Orris A. Browne, of the county of Northampton and State of Virginia, do certify that I was in command of the Virginia oyster steamer Tredegar to enforce the laws of the State of Va. in reference to oysters from April, 1870, to April, 1874. During the time I was in command I arrested persons claiming to be citizens of Maryland for oystering in both Tangiers and Pocomoke sounds.

No line had been marked at that time between Smith's point, at the south point of the mouth of the Potomack river, to the Pocomoke river.

Captain Hunter Davidson commanded the Maryland oyster police force part of the time named above. Captain Davidson and I found it necessary to have some line to guide us in enforcing the laws of the respective States of Virginia and Maryland, and we therefore agreed that the line across Tangier sound should be a straight line from Horse hummock, on Smith island, to the north side of Cedar straights, and the whole of Pocomoke sound was conceded to belong to Virginia.

Captain Davidson, so far as I know, and I was in position to know, never visited Pocomoke sound or attempted to exercise any jurisdiction there, nor did his successor, Capt. Timmon, so far as I ever heard, claim any jurisdiction in Pocomoke sound or attempt to exercise any authority there.

Given under my hand and seal this 5th day of June, 1893.

ORRIS A. BROWNE. [SEAL.]

49 COUNTY OF NORTHAMPTON, }
State of Virginia, } *To wit:*

I, R. D. L. Fletcher, a notary public in and for the county and State aforesaid, do hereby certify that Orris A. Browne, whose name is signed to the foregoing writing, bearing date June 5th, 1893, this day personally appeared before me in my county aforesaid and made oath to the same.

Given under my hand this 5th day of June, 1893.

R. D. L. FLETCHER,
Notary Public.

50 No. 10.

Governor's Letter.

COMMONWEALTH OF VIRGINIA,
GOVERNOR'S OFFICE, RICHMOND, *March* 17, 1884.

To the General Assembly of Virginia:

I have the honor to transmit herewith the report of George H. Bagwell, Esq., commissioner of the Virginia and Maryland boundary line, communicating the result of the operations conducted by Lieutenant F. V. Abbott, United States engineer corps, of the survey made by my direction and under supervision of the commissioners jointly, of the boundaries between the two States, in accordance with the acts of assembly, viz.: Act approved February 25, 1878; act approved March 14, 1878; act approved March 14, 1878 (chapter 243, page 225), and of an act approved April 2, 1879, conferring further duties and powers upon the governor in this regard.

The reports of the commissioner and the engineer are full and explicit, and are accompanied by calculations, surveys, and maps, which furnish a history of the subject involved. As this case should be made of official record, I request that all the documents relating thereto be ordered to be printed—the originals to be deposited in the office of the secretary of the Commonwealth among the archives of the State.

No necessity exists of any legislation on the subject, beyond the order to print, except in one respect. The expenses of marking the boundary line (which are divided by agreement between the States of Virginia and Maryland), have been discharged so far by the sum of seven hundred and two dollars and thirteen cents, leaving an unexpended balance of at least one thousand dollars of the appropriations already made by the acts already referred to, for defraying the costs for marking the boundary line. But the amount expended, while nearly covering all actual expenses, has not included any compensation to the Virginia commissioner for his time and service; and the governor has not felt justified by the terms of any of the acts referred to, to grant such compensation. I therefore request that the General Assembly in connection with the papers and reports submitted, should take some action in respect to the entitlement of the commissioner to pay, and either to make a direct appropriation for his benefit, or to authorize the governor to recompense the commissioner out of the sum yet unexpended of the appropriation aforesaid, to make reasonable payment for the services of the commissioner in establishing such boundary line between the States of Virginia and Maryland.

In this connection the thanks of the State are due to the Federal authorities for their prompt response to our request for the services of an officer of the engineer corps to act as an expert in determining the metes and bounds under the award of the commission which finally determined the vexed question of the true boundary between the two States.

WILLIAM E. CAMERON.

51 *Report of Commissioner.*

ONANCOCK, VA., *March* 8, 1884.

His Excellency W. E. Cameron, governor of Virginia.

SIR: I have the honor to enclose herewith the report of Lieutenant F. V. Abbott, United States engineer corps, on the survey of the Virginia and Maryland boundary line, with maps illustrating the same, in accordance with the act of assembly of March 14, 1878, providing for surveying and marking the Virginia and Maryland boundary line. I also submit the following report of the work performed by me as commissioner under said act:

In accordance with instructions received with my appointment as commissioner, dated April 2, 1879, I communicated with the Maryland commissioner, W. J. Aydelott, Esq., and had a conference with him, with a view to an early commencement of the work assigned to us. A general plan of procedure was agreed upon, and it was arranged to have a meeting with the United States engineer officer, and proceed with our work as soon as that officer reported for duty.

Shortly after this, I was informed that the State of Maryland had failed to make the necessary appropriation for her part of the expense of marking the boundary line, and that the work would be indefinitely postponed on that account.

In the meantime, an engineer officer had been detailed by the United States War Department, and had been directed to return to his post, by reason of the fact that the requisite appropriation had not been made by the Maryland legislature.

No further action was taken by me as commissioner, until I received a communication from Lieutenant Abbott, dated October 5, 1883, reporting for duty and proposing a meeting with the commissioners, which was accordingly held at Pocomoke City, Maryland, on October 11th ultimo.

At this meeting, arrangements were made for commencing work as soon as practicable, and Lieutenant Abbott proceeded to Willet's point, New York, to procure the necessary outfit of instruments, &c. On October 19th, he returned to Pocomoke City, and active operations were then commenced on the line of the peninsula, eastward from Pocomoke river.

The details of this work, including a general reconnoissance and examination of old landmarks, the running of the experimental line from Pocomoke river to Chincoteague bay, and thence to the ocean side of Assoteague island, and the final tracing and marking of the true line, are so thoroughly and accurately stated in the accompanying report of the engineer, that I presume it is not necessary to repeat them here.

52 Granite monuments, five in number, were placed at the main road crossings on the peninsula, in addition to one on the shore of Pocomoke river, and one on the north side of the town of Franklin, near the shore of Chincoteague bay.

On the eastern side of Chincoteague bay, a monument was placed near the south end of Great Pope's island, and one was also placed on Assoteague island, on the line of telegraph poles, 1,285 feet from "Pope's island life-saving station."

Between the monuments on the main land of the peninsula, trees were marked with notches and galvanized spikes, as described in the engineer's report.

West of the Pocomoke, monuments were placed at Watkins' point, on the north side of Cedar straits, at Horse hammock, on the east side of Smith's island, at Sassafras hammock, on the west side of Smith's island, and at Smith's point, on the south side of Potomac river.

For reasons stated in the engineer's report, it was deemed impracticable to mark the angular points in Tangier sound, except by ranges on the shore.

Iron range poles were set up on Smith's island, giving the direction of the line eastward from Horse hammock, and on the north end of Great Fox island, giving the direction of the line westward from Watkins' point.

There is a depth of water of about seventy feet at these angular points (marked A and B on the accompanying map), which are in midchannel, and beyond the limits of dredging.

The range poles referred to, are iron gas pipes, 20 feet long, 2½ inches in diameter, and 14 feet above ground. Being hollow tubes, flag-poles may be inserted in them, affording a range for vessels beyond the limits of the oyster grounds.

In Pocomoke sound, where it was considered impracticable to locate the angular points, and plant buoys, on account of the lateness of the season, the following directions are given by the engineer, with the approval of the commissioners, for temporarily defining the boundary of the oyster grounds between the two States:

From Watkins' point, the line runs due east, and makes an accurate range with a notable pine bluff on Sykes' island. This line is prolonged until it strikes point C, as laid down on the map, which is on the west side of the main channel of Pocomoke sound, and bears S. S. W. from a black buoy near the mouth of Pocomoke river.

The approximate line which is recommended in the absence of a buoy at point D, runs N. N. E. from point C, to the black buoy before mentioned, near the mouth of the river, thence follows the channel to the mouth of the river, and thence follows the middle of the river to the Scarborough and Calvert line.

While engaged on the work between the Pocomoke and Potomac rivers, the steamer "Leild," of the "Maryland oyster police force," was placed at our disposal, at the request of the Maryland commissioner, and we were indebted to her commander, Captain C. J. B. Mitchell, and her officers and crew, for kindness and courteous and valuable assistance rendered in the performance of our work.

It is due that I should make special acknowledgment of the skill and energy, and great interest manifested by Lieutenant Abbott and his accomplished assistant, Mr. Donald Creyk, in the work assigned to them.

I am also indebted to my associate on the work, Colonel W. J. Aydelott, the Maryland commissioner, for his co-operation and assistance. His experience as a former commissioner, and knowledge of important localities on the line of the peninsula, rendered his services especially valuable.

(Signed) G. H. BAGWELL,
Commissioner Virginia and Maryland Boundary Line.

53 *Report of the Engineer.*

HEADQUARTERS CORPS OF ENGINEERS,
UNITED STATES ARMY,
WASHINGTON, D. C., *September* 25, 1883.

Lieut. F. V. Abbott, corps of engineers, No. 404 Market street, St. Louis, Missouri.

(Through Major O. H. Ernst, corps of engineers, St. Louis, Missouri.)

SIR: I have to transmit herewith, for your consideration, copies of the following correspondence relating to the detail of an engineer officer to assist the commissioners of the States of Maryland and Virginia in establishing the boundary line between those States.

* * * * * * *

The chief of engineers would be glad to have you run the boundary line as proposed by the States of Virginia and Maryland, and authorized by the Secretary of War, and in the event of your acceptance, it is suggested that you proceed to this city and report in person to the chief of engineers, and by letter to the commissioners of the States of Maryland and Virginia, as in readiness for the duty specified in the acts of those States.

By command of Brigadier General Wright.

Very respectfully, your obedient servant,
(Signed) H. M. ADAMS,
Captain of Engineers.

In accordance with the above letter, Major O. H. Ernst relieved me from my duties under his immediate orders, and I reported in person to the chief of engineers on October 5, 1883, and on the next day by letter to the commissioner of Maryland, asking for an appointment to meet him and the Virginia commissioner, so that I could learn where the survey was to be made, and the character of the work to be done. By appointment, I met the two commissioners at Pocomoke City on October 11, 1883, and was then for the first time shown a copy of the award made by a board of arbitrators in 1877, defining the boundary line between the two States. At this meeting I learned from the commissioners that the boundary from Smith's point, at the mouth of the Potomac river, to the
54 mouth of the Pocomoke river, had been located on paper by
the board of arbitrators, and that here the survey was simply to mark the line on the ground. From the Pocomoke river to the ocean, the award defined the boundary to be a line run in 1668, by Scarbrogh and Calvert; and here the object of the survey was to retrace the old line as closely as possible. At this same time I made arrangements with the commissioners about organizing a party and beginning work. From Pocomoke City I went to the engineer depot at Willet's point, New York harbor, selected and tested my instruments, and returned to Pocomoke City on October 19th, and thence to my headquarters, at the house of Mr. John Brittingham, located near the line, and about five miles east of the Pocomoke river. Rainy weather followed until the 25th, on which date work began. As the line across the peninsula was defined only by marked trees, and as it was known, from former surveys, that they were not located exactly on any one straight line, the plan adopted was to run a trial line as near the true line as possible, and from it to locate each landmark which was considered to be authentic. From this trial line the final line was to be derived; so that it should agree as nearly as practicable with all the old marks. At the same time azimuth observations were taken to accurately determine the azimuth of the trial and final lines. Work on the trial line, from the Pocomoke river to the ocean, was continued until November 13th, on which day the shore of Chincoteague bay, near Franklin, was reached. On the 14th I crossed Chincoteague bay, and temporarily placed two granite monuments—one on Assoteague and one on Great Pope's island—locating them merely with reference to the position of the Pope's island life-saving station, as shown on coast survey chart, No. 28. In the evening I took azimuth observations, and measured the angle at my station, between the azimuth mark (Assoteague light) and a

signal erected at the end of the trial line near Franklin—distance, seven miles nearly. On November 15th, I returned to Franklin, and began to retrace the trial line already surveyed, for the purpose of checking it. Having completed the checking of the line to the east of my headquarters, I started, on November 19th, to meet a Maryland police steamer, which had been placed at my service for running the line across Chesapeake bay, and through Pocomoke and Tangier sounds. I finished surveying and marking the line west of the Pocomoke river on December 1st, and returned to my headquarters. Between December 1st and December 19th, the rest of the line across the peninsula to the east of Pocomoke river was checked, and the whole marked—the corrected marking on Great Pope's island and Assoteague island being done on December 6th. On December 19th field work was suspended, all of the party except one clerk was discharged, and I returned to Willet's point, to turn in the instruments, write the report, and draw the maps.

Description of Instruments Employed.

Theodolite.—The instrument employed was a transit theodolite, made to order by Buff and Berger, for use on the geographical survey west of the 100th meridian, and exhibited at the Centennial Exhibition in Philadelphia in 1876. The following are its dimensions:

Horizontal limb.—Eight inches in diameter, with two opposite verniers, each reading to 10″.

Vertical circle.—Five inches in diameter, with opposite verniers, each reading to 20″.

55 Object glass.—One and a half inches clear aperture. Focal length, 11 inches.

Eye-pieces.—One direct inverting, magnifying 30 diameters; one direct inverting, magnifying 40 diameters; one diagonal, magnifying 40 diameters.

Levels.—One attached, and one striding, each capable of reading to 1″. One round, on vernier plate, for preliminary adjustments.

Leveling-screws.—Three, acting against a strong spring, of which the compression is regulated by an adjusting nut.

Tripod.—Split legged, of unusual stability.

Standards.—Of two heights. The low, for triangulation work, are cast on the vernier plate. The high, for astronomical, or transit work, are secured by four large thumb-screws each.

Needle.—A good three and a half inch compass needle.

Reticule.—A seven-wire (spider line) reticule.

Illumination.—For night work, the instrument is provided with a lamp arm, lamp and adjustable plane reflector, giving an excellent illuminated field. The lamp gives great trouble on windy nights.

Accessories.—The instrument is ribbed throughout, and was found to preserve its collimation unchanged, even when exposed to the jars which are unavoidable in railroad or wagon traveling. It is provided with adjusting pins, sun-shade, duplicate thumb-screws, etc., etc.

Box.—It is packed in a box provided with straps, and arranged to be carried like a pedlar's pack. Total weight of instrument, box and tripod, is thirty pounds.

Rods.—The rods used in connection with the above were made of white pine, one and a half inches square, and nine feet long, and were provided with heavy plumb bobs, so attached as to ensure a vertical position of the rod when held by the rodman. The pegs were placed directly beneath the plumb bob, and the reading was always taken on the plumb line for distances less than four hundred yards. Beyond this limit the line was not visible, and the rod was bisected. To the top of each rod was attached a white flag two feet square.

Chain.—Distances were measured with a one-hundred-foot standard steel obtained especially for the survey. All links were made with brazed joints to prevent stretching.

Chronometer.—The chronometer employed was "Bond & Son," sidereal, No. 250, and proved itself to be an excellent instrument.

Organization of Party.

As the country through which the survey was to be made was sparsely settled, and accommodations for but few persons could be obtained at the farm-houses near the line, it was desirable to reduce the party to a minimum, although the time required for field work would be thus increased.

One rodman, who also acted as chainman, astronomical recorder, and assistant computer.

One rodman, who also acted as chainman, and

Two axemen, were consequently all the assistants that were employed.

The tripod with the body of the instrument attached, was carried by the engineer in charge, and a box containing the telescope, by one of the rodmen or axemen, depending on whether the country was woody or open. The axemen were negroes, and seemed
56 to be incapable of learning to follow a line defined by range flags; it was therefore found necessary to direct their cutting verbally from the instrument, and this limited the length of sights on the trial line to about two hundred yards. No chaining was done till the instrumental work on the trial line was completed; the axemen were then discharged, and the whole distance was chained under my immediate supervision.

Award. (*Public, No. 99.*)

An act giving the consent of Congress to an agreement or compact entered into between the States of Virginia and Maryland, respecting the boundary between said States.

Whereas arbitrators duly appointed on the part of the State of Virginia, and on the part of the State of Maryland, for the purpose of ascertaining and fixing the boundary between the States of Virginia and Maryland, did proceed in the premises to examine into and ascertain the true line of said boundary, and did award as to the same in words following, to wit:

Award.

"And now, to wit: January sixteenth, anno Domini, eighteen hundred and seventy-seven, the undersigned, being a majority of the arbitrators, to whom the States of Virginia and Maryland, by acts of their respective legislatures, submitted the controversies concerning their territorial limits, with authority to ascertain and determine the true line of boundary between them, having heard the allegations of the said States, and examined the proofs on both sides, do find, declare, award, ascertain, and determine, that the true line of boundary between the said States, so far as they are conterminous with one another, is as follows, to wit:

"Beginning at the point on the Potomac river where the line between Virginia and West Virginia strikes the said river at low-water mark, and thence, following the meanderings of said river, by the low-water mark, to Smith's point, at or near the mouth of the Potomac, in the latitude thirty-seven degrees, fifty-three minutes, eight seconds, and longitude seventy-six degrees, thirteen minutes, forty-six seconds; thence crossing the waters of the Chesapeake bay, by a line running north sixty-five degrees, thirty minutes east, about nine and a half nautical miles, to a point on the western shore of Smith's island, at the north end of Sassafras h*a*mmock, in latitude thirty-seven degrees, fifty-seven minutes, thirteen seconds, longitude seventy-six degrees, two minutes, fifty-two seconds; thence across Smith's island, south eighty-eight degrees, thirty minutes east, five thousand six hundred and twenty yards, to the centre of Horse h*a*mmock, on the eastern shore of Smith's island, in latitude thirty-seven degrees, fifty-seven minutes, eight seconds, longitude seventy-five degrees, fifty-nine minutes, twenty seconds; thence south, seventy-nine degrees, thirty minutes, east four thousand eight hundred and eighty yards, to a point marked A, on the accompanying map, in the middle of Tangier sound, in latitude thirty-seven degrees, fifty-six minutes, forty-two seconds, longitude seventy-five degrees, fifty-six minutes, twenty-three seconds; said point bearing from Jane's island light, south fifty-four degrees west, and distant from that light three thousand five hundred and sixty yards; thence south ten degrees, thirty minutes west, four thousand seven hundred and forty yards, by a line dividing the waters of Tangier sound, to a point where it intersects the straight line from Smith's
57 point to Watkins' point; said point of intersection being in latitude thirty-seven degrees, fifty-four minutes, twenty-one seconds, longitude seventy-five degrees, fifty-six minutes, fifty-five seconds, bearing from Jane's island light, south twenty-nine degrees, west; and from Horse h*a*mmock, south thirty-four degrees, thirty minutes east; this point of intersection is marked B, on the accompanying map; thence north, eighty-five degrees, fifteen minutes east, six thousand seven hundred and twenty yards, along the line

above mentioned, which runs from Smith's point to Watkins' point, until it reaches the latter spot, namely, Watkins' point, which is in latitude thirty-seven degrees, fifty-four minutes, thirty-eight seconds, longitude seventy-five degrees, fifty-two minutes, forty-four seconds; from Watkins' point the boundary line runs due east, seven thousand eight hundred and eighty yards, to a point where it meets a line running through the middle of Pocomoke sound, which is marked C, on the accompanying map, and is in latitude thirty-seven degrees, fifty-four minutes, thirty-eight seconds, longitude seventy-five degrees, forty-seven minutes, fifty seconds; thence, by a line dividing the waters of Pocomoke sound, north forty-seven degrees, thirty minutes east, five thousand two hundred and twenty yards, to a point in said sound marked D, on the accompanying map, in latitude thirty-seven degrees, fifty-six minutes, twenty-five seconds, longitude seventy-five degrees, forty-five minutes, twenty-six seconds; thence following the middle of the Pocomoke river, by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert, May twenty-eight, eighteen (*sic*) hundred and sixty-eight, at a point in the middle of the Pocomoke river, and in the latitude thirty-seven degrees, fifty-nine minutes, thirty-seven seconds, longitude seventy-five degrees, thirty-seven minutes, four seconds; thence, by the Scarborough and Calvert line, which runs five degrees, fifteen minutes north of east to the Atlantic ocean; the latitudes, longitudes, courses, and distances here given, have been measured upon the coast chart, number thirty-three, of the United States coast survey (sheet number three, Chesapeake bay, which is herewith filed as part of this award, and explanatory thereof; the original charter line is marked upon the said map and shaded in blue; the present line of boundary, as ascertained and determined, is also marked and shaded in red, while the yellow indicates the line referred to in the compact of seventeen hundred and eighty-five, between Smith's point and Watkins' point. In further explanation of this award, the arbitrators deem it proper to add, that—

"First. The measurements being taken, and places fixed according to the coast survey, we have come as near to the mathematical accuracy as in the nature of things is possible; but in case of any inaccuracy in the described course or length of a line, or in the latitude or longitude of a place, the natural objects called for must govern.

"Second. The middle thread of Pocomoke river is equidistant, as nearly as may be between the two shores, without considering arms, inlets, creeks, or affluents as parts of the river, but measuring the shore lines from headland to headland.

"Third. The low-water mark on the Potomac, to which Virginia has a right in the soil, is to be measured by the same rule: that is to say, from low-water mark at one headland, to low-water mark at another, without following, indentations, bays, creeks, inlets, or affluent rivers.

"Fourth. Virginia is entitled not only to full dominion over the

soil to low-water mark, on the south shore of the Potomac,
58 but has a right to such use of the river beyond the line of
low-water mark, as may be necessary to the full enjoyment
of her riparian ownership, without impeding the navigation, or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five."

"In testimony whereof we have hereunto set our hands the day and year aforesaid.

J. S. BLACK, *Of Pennsylvania.*
CHARLES J. JENKINS, *Of Georgia.*

A. W. GRAHAM, *Secretary.*

"And whereas the said award has been ratified and confirmed by the legislatures of the States of Virginia and Maryland respectively; therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement or award, and to each and every part and article thereof: provided that nothing therein contained shall be construed to impair, or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award.

"Approved March 3, 1879."

SCARBROGH AND CALVERT LINE.

Description of Country.

The country through which the line passes, is so flat as to afford but little opportunity for rain-water to flow off. As a result, the whole surface is intersected by marshy jungles, in which brambles and vines are so interwoven and tangled together, as to render it impossible to force a passage through them without cutting, while beneath, the soil is a soft muck into which one sinks above his knees, whenever the treacherous footing afforded by slippery and rotten roots gives way.

In one stretch of seven miles and three-quarters, seven of these swamps were traversed; some of them so obliquely, that the mud extended for two thousand feet along the line. Much of the remaining portion of the country was covered with woods in which the large trees had been felled for timber, and their places usurped by a dense growth of underbrush and sharp brambles. Occasionally marshes were encountered, in which a motion of the observer would so move the ground on which the instrument stood, as to change the azimuth of the latter by several minutes. This necessarily caused the trial line to wander considerably, but in check running, so much longer sights could be made, that it was always possible to ensure solid support for the tripod logs. A mile and a half was found to be about the greatest distance it was possible to advance the trial line in one day. In checking, four miles were easily covered in the same time; in chaining, eight miles were measured in seven hours on one occasion.

Trial Line—Methods on Land.

In the award, the azimuth of the Scarborough and Calvert line is given as 5° 15′ north of east, that is estimated from the 59 south 264° 45′. Starting from a point between two marked trees, one of which was north and the other south of the line, according to the information obtained from the commissioners, a line with this azimuth was run for some distance, till it became apparent that it was diverging quite rapidly from the old marks. It was prolonged far enough to give the means of determining approximately the azimuth of a line that would follow the marked trees more closely. This second line was now produced westward till it reached the Pokomoke river, a distance of four and two-tenths miles. But one reliable mark was found at any distance from the starting point, but the commissioner from Maryland, who was with the party which run over the line in 1867, thought that the point on the river was farther south than it had been located in that year. Acting on his opinion, the trial line to the east was run with such an azimuth as would make its prolongation pass through the point on the Pocomoke river, indicated to me as approximately that located by the former survey. This line was run toward the east for about four miles, the distance from it to each marked tree being measured. It had been plainly getting more and more south of the old line, and was there about three hundred feet south of several plainly marked, and generally accepted boundary oak trees of great age. A deflection to the north of 60° was now made, and this line prolonged far enough to meet a line through the starting point four miles back, and the old oaks before referred to. From this point a line to the eastward was run, with an azimuth which would make its western prolongation pass through the starting point. This line quite closely followed the old marks, which were more numerous in this part of the country. As before the distance to each mark was recorded.

Method to Cross Chincoteague Bay.

The ground on the western shore of this sheet of water is so low that Assoteague island cannot be seen without the use of a raised platform, but from the lookout of the Pope's island life-saving station on the island, the main land is plainly visible. A large lozenge-shaped signal of red and white cloth was placed on a high post located at the termination of the trial line, a boat was hired, and the party transferred to Assoteague island. From the lookout of the life-saving station, the signal was plainly visible, and the angle between it and the tower of Assoteague light was measured by four repetitions. At night the wind was so violent as to preclude the possibility of work so high above the ground, and a station in a sheltered position near the building was selected, and the azimuth of the line joining this latter point with Assoteague light was determined. The angle measured from the top of the lookout was reduced to the centre of this astronomical station, and the azimuth of the line joining the latter point with the signal at Franklin thus became known, and when the azimuth and position of the final line was determined, it was a simple matter to compute the distance from this astronomical station to the monument which was to be placed on the island. The details of the method employed will be given in Appendix I.

Derivation of Final from Trial Line.

After the trial line was computed, it was checked from end to end, the instrument being set up over one of the original pegs, the rear signal pole being held on the last peg occupied in the check survey, and the front signal over the most distant forward peg, at
60 which the ground was hard, and the pole could be clearly seen.
In this way long sights were obtained, and the instrument was set up on firm ground. As was anticipated, there were numerous slight deflections, but few of them exceeding two minutes of arc, and each of them was carefully measured, the instrument was reversed in the Ys (each time it was set up to eliminate any error in collimation). From the measured deflections, a set of corrections was computed, showing for each thousand feet the position of the trial line north or south of the arc of a great circle, having at the starting point the initial azimuth of the trial line. The distances of the marked trees from the trial line were then corrected for these slight wanderings, and the azimuth at the starting point of the arc of a great circle to agree as nearly as possible with them all was computed, a set of corrections showing how far north the latter line was of the corrected trial line, at each one thousand feet from the starting point was next computed; and these corrections added to those before obtained (regard being had to sign, north being called plus and south minus), gave the distance the trial line actually marked on the ground was north or south of the adopted line. At each thousand-foot peg on the trial line these distances were laid off on the ground in the proper direction, and a tree was marked, or monument was placed, as the case might be. If no tree was found exactly on the line, as was usually the case, one near the line was marked in a manner to distinguish it from any other marked trees in the vicinity, and its distance north or south of the true line recorded, with a full description of the tree and its marks. Monuments were always placed carefully on the line.

Method of Marking.

The line was marked at all important roads running from State to State by granite monuments, and between the stones by trees marked at average intervals of one thousand feet. The monuments were square granite posts, six inches square and four feet long. The top was cut smooth, with a V mark running diagonally across the square, with a letter M on one side of the mark, and a letter V on the other, the tops of the letters being toward the diagonal mark. Below the top, the first two inches were cut and dressed smooth; below the surface was left rough, as it was split from the quarry. The average weight was about one hundred and eighty pounds. These stones were sunk from two and a half to three feet in the ground, depending on the soil, with the letter M toward the north, and the V mark pointing in the direction of the line.

In marking the trees, three notches were cut on the eastern, and three on the western side of the tree, and a galvanized wrought-iron spike, four and a half inches in length, was driven in the middle notch on each side. The height of the notches was varied in such a manner as to give each tree an individual mark that could be easily recognized from its neighbors one thousand feet to the east and to the west. For each tree marked, a record was made of the height of the spike on the eastern side, and that of the spike on the western side, as well as of the kind of tree, its size at time of marking, and its surroundings, when these were of a distinguishing nature; also, a record of the distance of the centre of the tree, north or south of the true boundary line. Where it was possible, oak trees were selected for marking; next to these black-gum trees; next pines or dogwoods. The distance in feet from each marked tree to the "middle" county road was also recorded.

Description of Each Monument and Marked Tree.

61 Mark 1 east.—A granite monument a few feet north of the county road, known as the "middle road," about fifty feet from the point where it turns from north to west in passing Mr. John Brittingham's farm, and joins the county road to Wagram. The monument is plainly visible from the road. It is a post one foot square, cut smooth on the north and south, and tooled on the east and west faces. On the side toward the road is inscribed George H. Bagwell, commissioner in Virginia; on the side toward the woods, Colonel William J. Aydelott, commissioner in Maryland. On the top is a V mark, which indicates the boundary line, and also the figures 1883. This is the only monument which is unlike the model formerly described, and was designed and inscribed in accordance with the wishes of the commissioner from Maryland.

Mark 2 east—A pine tree (twenty-six and a half feet east, 7° north of mark 1,) with three axe-marks on the eastern side. The centre mark is three and seven-tenths feet above the ground, and has a galvanized wrought-iron spike driven in its centre. The western side is similarly marked, the height of the centre mark and spike being four and six-tenths feet. The southern side of the tree is tangent to the line.

Mark 3 east.—A pine tree (1,456 feet east of mark 1,) about one hundred feet from edge of woods; centre notch and spike on eastern side, three and seven-tenths feet above the ground; centre notch and spike on western side, four and four-tenths feet above the ground. The tree is about three feet south of the true line.

Mark 4 east.—Nineteen hundred and twenty-one feet east of mark

1, a large pine tree about five hundred feet west of the point at which the line enters the swamp, "Beaver Dam branch." Centre notch and spike on eastern side, three and one-tenth feet above the ground; centre notch and spike on western side, four and one-tenth feet above the ground. The tree is about one foot south of line.

Mark 5 east.—Thirty-five hundred and fifty-six feet east of mark 1, a white-gum tree close to where the line emerges from Beaver Dam branch. Centre notch and spike on eastern side, four and six-tenths feet above the ground; centre notch and spike on western side, three and seven-tenths feet above the ground. The tree is about two feet south of line.

Mark 6 east.—Ten thousand one hundred and forty-three feet east of mark 1, a young pine straight and vertical, about fifty-three feet north and slightly to the east of a darkey church. Centre notch and spike on the eastern side, three and five-tenths feet above the ground; centre notch and spike on the western side, three and five-tenths feet above the ground. The tree is about two feet north of the line.

Mark 7 east.—Ten thousand five hundred and forty-three feet east of mark 1, a thrifty young red oak. On the southern side of the county road, are two twin oaks, which are opposite this tree, and forty-two feet from it in a direction perpendicular to the road; centre notch and spike on the eastern side, three and four-tenths feet above the ground; central notch and spike on the western side, three and nine-tenths feet above the ground. The tree is about two feet north of the line.

Mark 8 east.—Eleven thousand and forty-three feet east of mark 1, a young white-gum tree, nine inches in diameter at the
62 butt, on the eastern side of a muddy branch, and twelve feet from the main stream. Central notch and spike on the eastern side, four feet above the ground; central notch and spike on the western side, four and five-tenths feet above the ground. The tree is on the line.

Mark 9 east.—About eleven thousand seven hundred and forty-three feet east of mark 1, a white-gum tree, sixteen inches in diameter at the butt, which stands on the edge of a branch. Central notch and spike on the eastern side, four and seven-tenths feet above the ground; central notch and spike on the western side, four and seven-tenths feet above the ground. The tree is about two feet south of the line.

Mark 10 east.—About eleven thousand nine hundred feet east of mark 1, the stump of an old traditionary marked tree, according to the testimony of the neighboring inhabitants. This stump is exactly on the line. As there was no hope of its lasting more than a few years, no marks were made upon it.

Mark 11 east.—Twelve thousand five hundred and forty-three feet east of mark 1, near a branch, a large red-oak tree, some sixteen inches in diameter at the butt. Central notch and spike on eastern side, four feet from the ground; central notch and spike on the western side, four and three-tenths feet above the ground. The tree is about one foot north of the line.

Mark 12 east.—Thirteen thousand five hundred and sixty-eight feet east of mark 1, a thrifty young pine, ten inches in diameter at the butt. Central notch and spike on the eastern side, four feet above the ground; central notch and spike on the western side, three feet above the ground. The tree is about two feet north of the line.

Mark 13 east.—Fourteen thousand five hundred and forty-three feet east of mark 1, a small white-gum tree, eight inches in diameter at the butt; the tree is in the woods about one hundred and fifty feet west of a road to the east of Mr. P. Outen's cleared land. The central notch and spike on the eastern side, three and five-tenths feet above the ground; the central notch and spike on the western side of the tree, three and five-tenths feet above the ground. The tree is on the line.

Mark 14 east.—Sixteen thousand five hundred and forty-three feet east of mark 1. A young pine tree, nine inches in diameter at the butt, just to the east of a wood lane, and not more than forty feet east of Mr. Outen's cleared land. This tree is in the edge of the woods which here begin on the north side of the road. Central notch and spike on the eastern side, two and five-tenths feet above the ground; central notch and spike on the western side, three feet above the ground. The tree is about three feet north of the line.

Mark 15 east.—Seventeen thousand five hundred and forty-three feet east of mark 1. At this point the northern fence of the county road is about sixty-three feet south of the line. No marks could be made, as the land north of the road is cleared.

Mark 16 east.—Eighteen thousand five hundred and forty-three feet east of mark 1. The northern fence of the county road is about fifty-four feet south of the line. No marks could be made, as the ground was cleared.

Mark 17 east.—Nineteen thousand five hundred and forty-three feet east of mark 1. The northern fence of the county road is about forty-five feet south of the line. No marks could be made, as the land was cleared.

Mark 18 east.—Twenty thousand five hundred and forty-three feet east of mark 1. The line here runs down the middle of the county road.

63 Mark 19 east.—Twenty-one thousand and forty-three feet east of mark 1. An enormous old oak universally known as "the marriage tree," because the tradition that it was on the State line was so universal that runaway couples from Virginia were married north, those from Maryland south, of this tree. It was plainly marked and had every evidence of being a genuine old landmark. The new central notch and spike on the eastern side are five and two-tenths feet above the ground; the new central notch and spike on the western side are four and eight-tenths feet above the ground. The line passes through the southern part of the trunk.

Mark 20 east.—Twenty-one thousand one hundred and three feet east of mark 1, a young maple. This tree is only sixty feet east of the marriage tree, and was marked only because of the great age of the latter, and its probable disappearance before many years. The central notch and spike on the eastern side are three and five-tenths feet above the ground; the central notch and spike on the western side are five feet above the ground. The tree is nearly on the line.

Mark 21 east.—Twenty-one thousand five hundred and forty-three feet east of mark 1, a young pine, ten inches in diameter at the butt, about two hundred feet east of a wood road. Central notch and spike on the eastern side, four and two-tenths feet above the ground; central notch and spike on the western side, three and three-tenths feet above the ground. The tree is about two feet south of the line.

Mark 22 east.—Twenty-two thousand five hundred and twenty-eight feet east of mark 1, a small white-gum tree, five inches in diameter at the butt, about two hundred and sixty feet west of a lane in the woods. This tree is marked only on the eastern side, the central notch and spike being four feet from the ground.

Mark 23 east.—Twenty-three thousand five hundred and forty-three feet east of mark 1. The line here runs along the southern ditch of the road. No mark could be made.

Mark 24 east.—Twenty-three thousand six hundred and three feet east of mark 1, an old pine tree plainly marked on both sides, but in a different way from most of the line trees, so that its authority is doubtful. It is on the line, but was not marked on account of its age.

Mark 25 east.—Twenty-four thousand five hundred and forty-three feet east of mark 1, northern fence of road, is about eleven feet south of the line.

Mark 26 east.—Twenty-five thousand five hundred and forty-three feet east of mark 1, large white-oak tree, twenty-two inches in diameter at the butt, plainly marked like Scarborough and Calvert trees. This tree was not discovered in running the trial line, and had no influence on the selection of the final line. Questioning those who lived in this neighborhood, brought out the fact that for many years it has been regarded as an authentic Scarborough and Calvert mark, but as it stands in the midst of dense woods, its existence was not generally known; it stands on the northern slope of a small gulley running into Swansecute creek on its western side. The new central notch and spike on the eastern side are four feet above the ground; the new central notch and spike on the western side are four and five-tenths feet above the ground. This tree is exactly on the line.

Mark 27 east.—Twenty-eight thousand five hundred and forty-
three feet east of mark 1, a pine tree, nine inches in diameter at the
butt, about two hundred feet west of a wood road leading to
64 Mr. Ling's. Central notch and spike on the eastern side, five
and five-tenths feet above the ground; central notch and spike
on the western side, three feet above the ground. The tree is about
one foot north of the line.

Mark 28 east.—Twenty-nine thousand four hundred and twenty-three feet east of mark 1, small young oak near the edge of a branch in the woods. This tree is marked only on the western side, where there are the three usual notches and spike. Height of central notch and spike, two and nine-tenths feet above the ground. This tree is nearly on the line.

Mark 29 east.—Thirty thousand four hundred and eighty feet east of mark 1, a white-oak tree surrounded by hollies; central notch and spike on the eastern side, five and one-tenth feet above the ground; central notch and spike on the western side, four and six-tenths feet above the ground. The tree is about six feet south of the line. It was chosen as being a tree promising longer life than any that was close to the line.

Mark 30 east.—Thirty-one thousand four hundred and fifty-one feet east of mark 1, a very old white oak, plainly marked and universally regarded as a Scarbrugh and Calvert tree. The tree was re-marked, great care being taken to leave the old marks uninjured. Central notch and spike on the eastern side are four and two-tenths feet above the ground; the central notch and spike on the western side are three and five-tenths feet above the ground. The tree is exactly on the line.

Mark 31 east.—Thirty-one thousand five hundred and thirty-five feet east of mark 1, a small pine marked, that the death of the old oak may not leave the position of the line in this vicinity uncertain. Central notch and spike on the eastern side, four feet above the ground; central notch and spike on the western side, four feet above the ground. The tree is close to the line.

Mark 32 east.—Thirty-one thousand seven hundred and twenty-eight feet east of mark 1, a large old white oak, plainly marked, and known as a Scarbrugh and Calvert tree. It stands on the northern side of a cultivated field, a few feet south of the fence, and six hundred and fifty feet west of the county road leading from Horntown to Stockton. The tree was re-marked, the greatest care being taken to leave the old marks unharmed. The new central notch and spike on the eastern side are four and five-tenths feet above the ground; the new central notch and spike on the western side are four and five-tenths feet above the ground. The tree is five feet north of the line.

Mark 33 east.—Thirty-two thousand three hundred and ninety-three feet east of mark 1, a granite monument standing on the eastern side of the county road from Horntown to Stockton, in the northwest corner of the woods which skirt the eastern side of the road to the south of this point. It is about ten feet from the side of the road. It is exactly on the line.

Mark 34 east.—Thirty-three thousand nine hundred and seventeen feet east of mark 1, a very old white oak, in the midst of the woods, marked with the usual three notches on each side. It is so long since the marks were made that they have almost disappeared, and are seen only on close examination. There seems to be but little doubt that this is a very old boundary tree. It was not re-marked, as it will stand but a few years at best. The tree is three feet north of the line.

Mark 35 east.—Thirty-three thousand nine hundred and fifty-three feet east of mark 1, a small dogwood tree, ninety feet west of a wood road. The tree is marked only on one side, and a spike is driven in the middle notch, four feet above the ground. The tree is close to the line.

65 Mark 36 east.—Thirty-four thousand eight hundred and twenty-three feet east of mark 1, a large white oak, with a deep notch cut on the north side. The bottom of the notch is two and two-tenths feet south of the true line. The central notch and spike on the eastern side are four and six-tenths feet above the ground; the central notch and spike on the western side are four and nine-tenths feet above the ground. The tree is about two feet south of the line.

Mark 37 east.—Thirty-five thousand four hundred feet east of mark 1 (approximately), two pines, each with a single deep notch cut in it. The bottoms of these notches are two and seven-tenths feet south of the line.

Mark 38 east.—Thirty-five thousand nine hundred and forty-three feet east of mark 1, a white-oak tree, six inches in diameter at the butt, three hundred feet west of county road. The central notch and spike on the eastern side are four and nine-tenths feet above the ground; the central notch and spike on the western side are four and nine-tenths feet above the ground. The tree is just north of the line.

Mark 39 east.—Thirty-six thousand two hundred and forty-three feet east of mark 1, an old marked dogwood, close to an old marked pine, on the western side of a road running nearly north and south. The marks on the dogwood are generally believed to be of very great age, and are attributed to Scarbrough and Calvert. The pine is of later marking. Both are six feet south of the line.

Mark 40 east.—Thirty-six thousand eight hundred and eighteen feet east of mark 1, an old oak tree, rotten and ready to fall. It was pointed out as having been a traditionary tree, re-marked in 1867 by Mr. John De La Camp, when surveying the line. No signs of old marks could be seen on account of the rotten condition of the tree. The tree is about six feet south of the line.

Mark 41 east.—Thirty-six thousand eight hundred and ninety-three feet east of mark 1, a very old marked white-oak tree. The marks were very distinctly visible upon close examination, but it was merely in the grain of the bark, all depression or elevation of the marks having long since disappeared. This tree is generally believed by the neighbors to be an old Scarbrough and Calvert tree. It very slightly north of the line—less than one foot.

Mark 42 east.—Thirty-eight thousand one hundred and forty-eight feet east of mark 1, a young pine, ten inches in diameter at the butt, about forty feet east of the road. The central notch and spike on the eastern side are four and five-tenths feet above the ground; the central notch and spike on the western side are four and five-tenths feet above the ground. The tree is close to the line.

Mark 43 east.—Thirty-eight thousand nine hundred and twenty-five feet east of mark 1, a pine tree with a smaller pine two feet northeast of it. The tree is twenty-eight feet west, thirty degrees south of a young white-oak tree. The tree is about six hundred feet east of a small lane in the woods. The central notch and spike on the eastern side of the tree are five and one-half feet above the ground; the central notch and spike on the western side of the tree are five and one-half feet above the ground.

Mark 44 east.—Thirty-nine thousand eight hundred and sixty-eight feet east of mark 1, a large pine in woods, about one hundred and fifty feet north of county road to Franklin, and about thirteen hundred feet west of a road leading north from Franklin. The central notch and spike on the eastern side of the tree are five feet above the ground; the central notch and spike on the western side of the tree are five feet above the ground. The tree is on the line.

66 Mark 45 east.—Forty thousand nine hundred and forty-three feet east of mark 1, a large holly tree, three hundred feet west of the road leading north from Franklin. The central notch and spike on the eastern side of the tree are six feet above the ground; the central notch and spike on the western side of the tree are five and five-tenths feet above the ground. The tree is one foot north of the line.

Mark 46 east.—Forty-two thousand four hundred and forty-three feet east of mark 1, a granite monument on the eastern side of the Franklin, Stockton county road, about three hundred yards north of Greenback.

Mark 47 east.—Forty-four thousand three hundred and forty-three feet east of mark 1, a granite monument on top of a hill, about two hundred feet east of the Old Dominion railroad, in the midst of a cultivated field.

Mark 48 east.—A granite monument near southern end of Great Pope's island, two hundred and seventy-six feet southwest from southwest corner of Mr. Robert Watson's house.

Mark 49 east.—A granite monument on line of telegraph poles on Assoteague island, one thousand two hundred and eighty-five feet northeast from Pope's island life-saving station.

Mark 1 west.—Two thousand and forty-four feet west of mark 1 east, the south fence of road is about twelve feet in Virginia.

Mark 2 west.—Three thousand one hundred and forty-three feet west of mark 1 east. At this point the line is nearly in the middle of the road, the south fence being fifty-one feet in Virginia.

Mark 3 west.—Four thousand five hundred and fifty-seven feet west of mark 1 east. At this point the line is on the southern edge of the road.

Mark 4 west.—Four thousand seven hundred and thirty-seven feet west of mark 1 east, a very old oak tree, universally known as a Scarborough and Calvert tree. Although the tree was very old, it was re-marked in the usual way, carefully leaving the old marks uninjured. The central notch and spike on the eastern side are four and one-tenth feet above the ground; the central notch and spike on the western side are four and eight-tenths feet above the ground. The tree is about two feet south of the line.

Mark 5 west.—Five thousand and twenty-six feet west of mark 1 east. A young red oak, ten inches in diameter at the butt. The tree stands on the south side of the road, about two hundred feet west of a branch which crosses the road, and about two hundred feet east of a prominent turn in the road. The central notch and spike on the eastern side of the tree are four and nine-tenths feet above the ground; the central notch and spike on the western side of the tree are five and one-tenth feet above the ground. The tree is about one foot south of the line.

Mark 6 west.—Five thousand five hundred and seventy-three feet from mark 1 east. The line is here about two hundred feet north of a big pine on the northern side of the road.

Mark 7 west.—Six thousand one hundred and twelve feet west of mark 1 east, a large lone pine tree, fourteen feet from the edge of Wagram mill-pond, at the first point at which the line enters the water. The central notch and spike on the eastern side of the tree are four and one-half feet above the ground; the central notch and spike on the western side of the tree are four and one-half feet above the ground. The tree is on the line.

Mark 8 west.—Six thousand six hundred and sixty-three feet west
of mark 1 east, a granite monument in edge of a grove of
67 pines to the north of the road, where a small peninsula pro-
jects from the southern shore of the mill-pond. The stone is
plainly visible from the road.

Mark 9 west.—Nine thousand two hundred and sixty-eight feet west of mark 1 east, a young straight pine, eight inches in diameter at the butt, on the northern edge of a pine grove lying north of the Mill branch leading from Wagram mill-pond. The tree is one thousand feet, measured on the line west of the Wagram mill-dam. The central notch and spike on the eastern side of the tree are four feet above the ground; the central notch and spike on the western side of the tree are four feet above the ground. The tree is on the line.

Mark 10 west.—Fourteen thousand six hundred and twenty-one feet west of mark 1 east, a point on the western end of Mr. Buck's brick house, twelve feet south of the extreme northwest corner.

Mark 11 west.—Sixteen thousand two hundred feet west of mark 1 east, a young thrifty pine tree on the western edge of Mill Gut swamp. The central notch and spike on the eastern side are four and five-tenths feet above the ground; the central notch and spike on the western side are four feet above the ground. The tree is accurately on the line.

Mark 12 west.—Seventeen thousand six hundred and ninety-two feet west of mark 1 east, a walnut treet, twenty inches in diameter at the butt, standing about thirty feet west of Mill Gut swamp, in a darkey burying-ground. The central notch and spike on the eastern side are four and six-tenths feet above the ground; the central notch and spike on the western side are four feet above the ground. The tree is about four feet north of the line.

Mark 13 west.—Nineteen thousand eight hundred and eighty-eight feet west of mark 1 east, a pine tree on the edge of a gut. The central notch and spike on the eastern side are three and nine-tenths feet above the ground; the central notch and spike on the western side of the tree are three feet above the ground. The tree is about one foot south of the line.

Mark 14 west.—Twenty thousand three hundred and twenty-nine feet west of mark 1 east, a tall young pine, nine inches in diameter at the butt; the tree is one of a clump of two growing together on the western edge of the gut. The tree is about one foot north of the line.

Mark 15 west.—Twenty-one thousand and ninety-four feet west of mark 1 east, a young pine on western edge of a marshy glade. The central notch and spike on the eastern side are four and three-tenths feet above the ground; the central notch and spike on the western side are three and six-tenths feet above the ground. The tree is on the line.

Mark 16 west.—Twenty-one thousand five hundred and sixty feet west of mark 1 east, a pine tree, twelve inches in diameter, about sixty feet east of a wood road. The central notch and spike on the eastern side of the tree are four feet above the ground; the central notch and spike on the western side of the tree are three and three-tenths feet above the ground. The tree is close to the line.

Mark 17 west.—Twenty-two thousand and fifty-four feet west of mark 1 east, a large pine, eighteen inches in diameter at the butt, in a muddy glade. The central notch and spike on the eastern side of the tree are three and nine-tenths feet above the ground; the central notch and spike on the western side of the tree are four feet above the ground. The tree is about two feet north of the line.

Mark 18 west.—Twenty-two thousand eight hundred and nineteen feet west of mark 1 east, a young pine, nine inches in
68 diameter at the butt, on the edge of an open field extending to the river. The central notch and spike on the eastern side of the tree are five feet above the ground; the central notch and spike on the western side are five feet above the ground. The tree is about one foot south of the line.

Mark 19 west.—Twenty-three thousand eight hundred and forty feet west of mark 1 east, a granite monument near the bank of the Pocomoke river, about a hundred yards southwest of a farm-house.

Evidence of Correctness of the Final Line.

The problem of retracing the old line, as originally run, was much more complex than it otherwise would have been, from the fact that about sixteen years ago it was retraced and re-marked in a very hurried manner, the entire survey occupying but two weeks, and the original trial line being marked as it advanced. The trees then marked were furthermore chopped in imitation of the old trees, so that to distinguish an old reliable mark from one made sixteen years ago was difficult in the extreme. Reliance was placed upon the memory of the Maryland commissioner who was with Mr. De La Camp when he run the line in 1867, and only those trees which were generally known as Scarbrugh and Calvert trees were given weight in determining the final position of the line. It may be re-marked, that my line crossed Mr. De La Camp's line some four times, if the marks shown to me really were made by him.

The location of the final line was based upon nine old trees, which were all the marks that were pointed out to me as being trustworthy. They were unevenly distributed over eight miles of the line. Out of these nine trees, six are within one foot of the line; two are north of it, respectively, five and three feet, and one south of it, six feet—all three trees being within one stretch of four thousand five hundred feet toward the eastern end of the line which passes through an old marked tree still farther east.

In marking the final line, a very old marked tree was found, of whose existence I had not been informed, but upon investigation, it was found that a boundary tree was known to be in the woods somewhere in the vicinity, but its exact location had been lost. It was surrounded by dense woods and brambles; it proved to be exactly on the line as traced without reference to it. Another fact seems to corroborate all the rest; and that is, the line bisects an old brick house, which has always been believed to be exactly on the line. This house being situated nearly ten miles from the most eastern traditionary tree, shows that the azimuth of the line cannot be far in error.

Furthermore, the line produced seven miles across Chincoteague bay, in a single sight of which the azimuth was determined astronomically, strikes that island at about the mean position found by several former surveys made by private individuals, whose patents called for land up to the boundary of their States. It is believed that the line just marked, is as close an approximation as care and impartiality can now make to the position of the old Scarbrugh and Calvert line. The astronomical azimuth of the line as now marked is at mark 1 east, 263° 55′ 35.26″ estimated from the south, or as given in the award 6° 04′ 24.74″ north of east. The azimuth of the line at Franklin measured astronomically, agreed with that deduced geodetically by the L M Z formula from the known azimuth at mark 1 east, to within three minutes of arc.

69 LINE TO THE WEST OF POCOMOKE RIVER.

General Considerations and Methods.

To the west of the Pocomoke river the line passes for the most part through the waters of the Chesapeake bay, Tangier sound, and Pocomoke sound. The only land traversed between the mouths of the Potomac and Pocomoke rivers, being Smith's island and Great Fox island. A piece of low marsh forming the southwest part of Sommerset county, Maryland, and named Watkins' point in the award, although not generally so known by the inhabitants of the neighboring county, was formerly tangent to the line, but has washed away so that it no longer touches Virginia. The water stretches are so long that it is not possible to see Smith's island from Smith's point, nor Great Fox island from Smith's island, unless under exceptionally favorable conditions of the atmosphere, and even then the use of numerous high signals stations would have been necessary to admit of connection by means of triangulation. As this part of the country had been triangulated by the coast survey in 1849, it was deemed best, considering the lateness of the season, to trust to the correctness of the cost survey stations, and to locate the monuments from them, using for this purpose azimuths determined astronomically, and distances measured by chain. There was no difficulty in marking the boundary on land, but this was far from being the case on the water, where four angular points, lying on the average eighteen thousand five hundred feet from the nearest shore, occurred. Two of them in Tangier sound, are located where the water is about seventy feet deep. It was plainly impracticable to mark these, except by ranges on the shore intersecting at these angular points; and even then the line joining the two consecutive water points, would be entirely unrecognizable, except for vessels stationed exactly over one of them; for in the prolongation of this connecting line, there is no land within fifteen miles on which to place range signals. Under the circumstances, it was deemed best to set up iron range poles to show the position of the lines which leave the shore, and to roughly indicate their outer extremities—that is, the angular points—by giving the soundings which are there found. In Pocomoke sound the depth of water is slight, and nothing prevents placing proper beacons on the angular points, but to locate them would have required a somewhat extended triangulation along the shore, and the rapid approach of winter storms rendered impracticable anything more than a steamboat reconnoisance of the locality. The work accomplished on this part of the line may be summed up as follows: All the land points have been finally marked. The portions of the line where it leaves the shores of Smith's and Great Fox islands, are definitely located for about a mile and a half out from the beach, that being the distance at which it becomes difficult to see the range poles. Beyond these limits the line is defined only by compass bearings to prominent objects on shore, or buoys in the water. Enough of the appropriation remains unexpended to satisfactorily mark the line in Pocomoke sound, but in Tangier sound, the great depth seems to prohibit more than has been already done.

The monuments used were the same as on the Scarbrough and Calvert line, the range poles were two and one-half inch gas pipes, twenty feet long, projecting about fourteen feet above the ground. To plant them, a hole about a foot square and four feet deep was
dug, the pipe was next raised in it, carefully put in exact
70 position, and then forced down about two feet into the mud
at the bottom. It was then filled in with oyster shells, sand, and marsh sod, a little at a time, the whole being most thoroughly rammed and compacted after each shovelful of filling.

Details at Smith's Point.

At this locality there is an old stone light-house tower, which was used as a primary station of the United States Coast Survey in 1849.

Its revised latitude and longitude, as given by the Coast Survey office in 1883, are as follows:

Latitude, 37°, 53′, 18.41″.

Longitude, 76°, 14′, 17.06″.

The latitude and longitude of the initial point of the boundary line given in the award are as follows:

Latitude, 37°, 53′, 08.00″

Longitude, 76°, 13′, 46.00″.

At first it would seem that the initial point was south 10.41″, and east 31.60″ of the old tower, but examination of the award shows that "the latitudes and longitudes, courses and distances, here given, have been measured upon the coast chart No. 33, of the United States Coast Survey (sheet No. 3, Chesapeake bay), which is herewith filed as a part of this award and explanatory thereof." Application was made to the governor of Maryland for this chart, at the outset, through the Maryland commissioner, but the application was refused. This left a doubt as to whether the new corrected coast-survey longitudes indicated by small marks in the border to the right of the meridians drawn on the charts in full had been used, or whether the longitudes had been measured from the full meridians on the chart. Examination soon showed that the latter had been used throughout in the award when defining positions capable of recognition on the map (such as Horse and Sassafras hammocks), and therefore all the award longitudes had to be reduced to the corresponding new longitudes before they could be used in connection with the geographical positions of coast-survey stations furnished me by the coast and geodetic survey office in 1883. That is, the award longitudes must all be increased by twenty-one seconds of arc. The latitudes are unchanged, and therefore the point to be marked was 10.41″ of latitude south of the old tower, and 10.60″ of longitude east of it. Converting seconds of latitude and longitude into feet, the monument should be east eight hundred and thirty-one and six-tenths feet, south ten hundred and seventy-two and two-tenths feet. It was impracticable to place a monument in this position, as there was no soil there except shifting sands, which are so low that the waves break over the whole in every storm. The nearest point that would afford a reasonably stable foundation was selected, and a granite monument placed there. This stone is five hundred and forty-six and five-tenths feet north, and four hundred and sixty-four and seven-tenths feet west of the true initial point of the line. It is six hundred and forty-one feet from the centre of the old tower, and bears from the latter south 34° 51′ east. It is on a small mound of sand, which is protected from shifting by a growth of chinch bushes. As this is an angular point, the score on the top of the monument cannot be made parallel to the boundary line. The stone is placed simply so that the M shall be toward the north and the V toward the south.

71 *Details on Smith's Island.*

At this locality the western beach has been eroded nearly three hundred yards since 1849, and Sassafras *ha*mmock, named in the award, as well as all the neighboring coast-survey marks on this side of the island, are now far out in Chesapeake bay; but the station at Shanks' *ha*mmock, on the eastern shore of a small island, eleven thousand five hundred feet south of the line, was recovered most satisfactorily. To connect with this point, which was separated from the main body of Smith's island by a broad shallow lagoon, the distance was chained through the water, using stout wooden staves in place of the usual steel pins. Every tenth pole was left standing, as a range to preserve the direction. Two boats were used—one to carry the forward, the other the rear chainman. When the rear boat came to a staff, it was stopped by the man polling it; while the rear chainman held the end of the chain near, but not touching the staff, the chain was strained by the men maneuvering the forward boat, and when taut the forward chainman carefully thrust a staff vertically into the mud opposite his end of the chain, and accurately on the range. Great care was exercised, both to keep on line and to strain the chain without moving the staves, and it is believed that the distance was measured nearly as accurately as if it had been done on land. The distance was chained from Shanks' *ha*mmock north 1° 08′ 12″ east, until the computed intersection of this line with the defined boundary line was reached. From this point a line was run to pass through the middle point of Horse *ha*mmock, as required by the award, and the azimuth of this line determined astronomically. An attempt was made to chain across the island to the shore of Chesapeake bay, but the marsh was found to be so soft that it was utterly impracticable. The position of the intersection of the boundary line with the line of the beach, was therefore determined trigonometrically. As no solid ground for an astronomical station could be found near the line, a station was selected across Shanks' creek, as shown on the map, and the azimuth there determined carried to the line by angles read with six repetitions. The azimuth given in the award is south 88°, 30′ east, that in azimuth estimated from the south 271°, 30′. The azimuth of the line actually marked is 270°, 14′, 11.86″. At first this difference of azimuth appears to be large, but in reality it corresponds to a difference of but three seconds in the latitude of the centre of Horse *ha*mmock, that is to a distance of one-twentieth of an inch on the chart from which the latitudes were measured by the arbitrators. The *ha*mmock has no definite line of separation between it and the surrounding marsh. The position shown on the coast chart No. 33, is undoubtedly nothing more than a general indication that there is high ground in this locality, and the estimated position of its centre might reasonably be expected to be more than one-twentieth of an inch in error. The point selected and marked on the ground is the centre of the mound. On the map are laid down the actual position of the monument, and the point defined by the latitude and longitude as fixed in the award. At Horse hammock two range poles were erected. The azimuth of the line joining them being 280°, 29′, 00″, that is as defined in the award south 79°, 31′ east. These poles can be seen by the naked eye for a distance of about a mile and a half, that is only half way to the angular point A. They should be replaced by iron tripods surmounted by some prominent objects like hollow spheres about two feet in diameter, to make them of real value in marking the line.

The sounding at point A is according to the coast-survey chart, sixty-six feet.

72 *Details at Great Fox Island.*

After passing angular point B in Tangier sound, the line crosses the northern end of Great Fox island, and here two range poles were erected. The coast-survey station on this marsh washed into the sound some years ago, but an old gentleman, Mr. Planer Crockett, who was living on the island when the point was established in 1849, was able to show me some stumps yet projecting above the water, which he assured me were close to the old tripod. From this point I chained north 1°, 15′ east, a distance of three thousand eight hundred and fifteen feet, and there established a station; as this was a point of the defined line, everything indicated that I had been shown the true position of the station, and that the eastern shore of the island and the ponds and sloughs in its interior were unchanged since the original survey. The azimuth of Jane's Island light was astronomically determined, and from it the range poles were put in, so that the line joining them has the azimuth 265°, 15.00″; that is, according to the award, 85°, 15′ east of north. The sounding at point B, is, according to the coast-survey chart, seventy-two feet.

Details at Watkins' Point.

It was found that Watkins' point had cut away, since the survey of 1849, to such an extent, that the boundary line does not touch its shores. A monument was placed eighty-six feet back from the water. This stone is — feet north of the line, and was only put in as a reference point from which the true boundary could be found by simple measuring. This monument and the one at Smith's point, are the only granite stones that are not accurately on the line.

Details in Pocomoke Sound.

From Watkins' point the line runs due east, and if prolonged beyond point C would strike the pine bluff in rear of Sykes' island. At point C, the black buoy, No. 9, near the mouth of the river bears about north-northeast. Up to this point the line is marked by the bluff to the east, and Cedar straits to the west, in a very satisfactory manner, but there is no prominent object on shore by which to locate point D.

The commissioner from Virginia suggested, that for purposes of oyster police, the line from point C to black buoy 9 be adopted as an approximate line, that can be followed without difficulty until some proper mark be placed at point D. In this the Maryland commissioner concurs.

In closing this report, I wish to express my obligations to the members of my party, especially to Mr. Donald M. Creyk, whose readiness in the field and accuracy in the office have much lessened my own labors.

73 And now, at this day, to wit, at a circuit court of the United States in and for the eastern district of Virginia, held at Richmond, in said district, on the 15th day of September, 1893.

Ex Parte ROBERT L. WHARTON: On Petition for Writ of *Habeas Corpus.*

In accordance with the opinion of this court filed in this cause on the 15th day of September, 1893, it is hereby ordered that the writ of *habeas corpus* heretofore issued herein be dismissed and the said Robert L. Wharton be remanded to the custody of the sheriff of Accomack county, Virginia.

N. GOFF, *Circuit Judge.*
RO. W. HUGHES, *Judge.*

The opinion of the court referred to in the foregoing order is as follows, to wit:

74 Circuit Court of the United States, Eastern Dirtrict of Virginia.

Ex Parte W. W. MARSH, R. L. WHARTON, and SEVERN NELSON, Imprisoned for Violating Oyster Laws of Virginia, Brought into Court on Writ of *Habeas Corpus.*

Three citizens of Maryland, William W. Marsh, Robert L. Wharton, and Severn Nelson, are before the court on writs of *habeas corpus* issued upon petitions, severally alleging that they have been unlawfully prosecuted for violating certain laws of Virginia relating to oysters, and have been unlawfully convicted and imprisoned by the county court of Accomack county, Virginia, for the offences charged. Marsh was convicted of violating section 2156 of the Code of Virginia, which forbids all persons from taking or catching oysters with a dredge, scraper, or any other instrument than ordinary oyster tongs in any of the waters of the Commonwealth except as prescribed by other sections of the code. Wharton and Nelson were convicted under section 2147 of the Virginia Code, which forbids any person other than a resident of Virginia who has paid a tax and obtained a license as prescribed by law from taking or catching oysters in any manner in the waters of the State.

The indictments in the cases of Wharton and Nelson charge that the offences were committed on Ledge rock, in that part of Pocomoke

sound which lies within the limits of Virginia. The indict-
75 ment in the case of Marsh charges that the offence was com-
mitted on Harley's rock, in Tangier sound, within the limits of Virginia. It is conceded that all of the offences were committed within the limits of Virginia, but it is contended, in defense, that by reason of Wharton's and Nelson's offences having been committed in Pocomoke sound by citizens of Maryland the courts of Virginia cannot take cognizance of them, and that by reason of Marsh's offence having been committed at a place near the bound-ry line between Virginia and Maryland running from Smith's to Watkins' point, where the line is "doubtful," the Virginia courts have no jurisdiction to try him as a citizen of Maryland.

We shall deal in treating the question raised more directly with the cases of Wharton and Nelson and afterwards with that of Marsh.

A great mass of documentary evidence and historical literature has been filed by counsel on both sides as evidence in these causes. We have studied it with great care and as thoroughly as the importance of the question involved seemed to require. The extraordinary volume and diffuseness of this evidence renders necessary a more elaborate discussion and decision than is usually submitted from the bench in ordinary litigation.

We will first describe in some detail as matters of common knowledge the oyster properties of Pocomoke sound and the laws of Virginia enacted for the protection generally of her oyster interests.

Pocomoke sound has an area of about ninety square miles
76 and is one of the largest subdivisions of Cheapeake bay. Ac-
cording to the survey recently made by Captain Baylor under an act of the legislature of Virginia fifty-two square miles (28,528 acres) of this area is natural oyster rocks, beds, or shoals. It is common knowledge that the natural growth of oysters in this sound at one time was nearly depleted by constant and imprudent dredging; but some ten or twelve years ago the legislature of Virginia prohibited dredging, and since then the oysters on the natural rocks have recuperated, and now the sound is well stocked. Immense quantities are removed annually, but so long as the removals are made with tongs only the quantity continues to be abundant and a rock if worked and nearly depleted will when left alone reseed itself with a growth of small oysters, which in two or three years become marketable.

It is doubtful if so rich a deposit of oysters in as small a territory can be found in the waters of Virginia or Maryland. That portion of Tangier sound which is within the limits of Virginia is a much larger body of water than Pocomoke sound, and although it is looked upon as rich in its production of oysters, yet it has but 4,746 acres (seven square miles) of natural beds, rocks, or shoals. Pocomoke river is a navigable stream midway on the Eastern Shore peninsula, lying wholly within the State of Maryland in its entire course southward until it crosses the boundary line five miles above its mouth and until 1877 lying wholly within Virginia for that five miles from the boundary line to its mouth, where it empties into the sound.

77 It is shown by public documents that Pocomoke sound supplies the main, almost entire, support to at least three thousand of the inhabitants of Accomack county, Virginia, counting only those engaged in the oyster industry and the members of their immediate families. Of that part of the population dependant upon their labor in this sound for the maintenance of themselves and families five-sixths rely upon taking oysters directly from the places of their natural growth and selling the catch. The remaining sixth plant alone or combine planting with tonging. The planters have their grounds, upon application, assigned to them and marked by stakes by the oyster inspector of the district, who is an officer of the State of Virginia. Then they are surveyed by the county surveyor and the survey returned to and recorded in the county court clerk's office. This, if exceptions are not filed and sustained, authorizes the planters to hold their assignments so long as they pay the annual rent to the State. The planter prepares his ground by depositing shells upon it and placing a limited quantity of oysters thereon to facilitate its seeding. If no oysters are placed upon the bed, still the spawn will attach itself to the shells and produce a growth, but this process is hastened by placing seed oysters upon the prepared bed, as before stated. In a few years the oysters grow so large and thickly that it becomes difficult to distinguish the artificial beds from the natural rocks. At maturity (in about three years, if the location is suitable) the oysters are removed from the beds and marketed, the quality being superior to and the oysters commanding a better price than those taken from the natural rocks.

78 Official records show that 139 assignments and surveys have been made in Pocomoke sound upon applications of planters, and these surveys embrace a little more than 1,000 acres. The records show that the surveys run from one-eighth of an acre to one hundred and five acres, most of them containing less than ten acres. Some few persons, but very few, occupy lands for planting purposes which have not been assigned or surveyed, and consequently they have never acquired a legal right to hold them.

The laws of Virginia regulating the oyster culture are found in the code and statutes. The owner of a boat to be used in taking or catching oysters from the natural rocks is required to have the boat registered by the oyster inspector of his district every year and pays the inspector for his services a fee of fifty cents annually. Each registered tongman is required to report weekly the amount of his sales of oysters and to pay thereon an amount equal to the amount of tax levied by the State on any other species of property, but at the time of registering any tongman can commute the tax on his sales by paying two dollars for the entire season. This the tongers invariably do, because it relieves them from the trouble of making weekly reports and the amount of commutation is less than the tax on sales would amount to. The planter pays an annual rent of one dollar per acre for the land assigned to him and he also

reports to the commissioner of the revenue where he lists his property for taxation the amount of his sales of planted oysters for the preceding year, upon which sales is assesseed a tax the same
79 as upon other taxable property. These are the only taxes collected from tongers or planters.

Two truths are obvious from the foregoing recital: First, that unless laws are passed and stringently enforced for the protection of the oyster rocks, beds, and plants in Pocomoke sound, the oysters which are produced in profusion there will soon be destroyed; and, second, that in order to preserve and cultivate the oyster and increase its production in those waters it is necessary to allow of private proprietorship in the oyster plants, subject at the pleasure of Virginia to such taxation as entails upon the State the duty of protecting these taxed oyster properties by police and penal laws. These truths very broadly distinguish the oystering industry from that of catching running fish in the waters of the Chesapeake and its tributaries, in which there can be no private property until they are caught, and invalidate any claim that may be made by inference to the right of oystering from grants, in general terms, of the right of fishing.

We think, moreover, it may be laid down as a proposition of natural law that, inasmuch as oysters are becoming more and more valuable and necessary every year with the growth of populations as human food, any State possessing great and productive oyster deposits owes it as a duty to humanity, no less than to her own citizens engaged in the oyster culture, to protect these deposits from such depredations as destroy their valuable product.

In order to give effectual encouragement to this industry Virginia has enacted laws, some of which have been described above,
80 which confer private rights in oyster beds and which impose taxes upon cultivators of oysters which are expended in supporting a police force charged with the duty of protecting these private properties from such depredations as those of which the petitioners have been convicted.

We do not understand that the validity of these laws of Virginia is questioned by counsel for the petitioners or that they question the right of private property in oyster beds. The defense set up for the petitioners is technical only, denying the jurisdiction of the Virginia court which convicted them, and basing the denial solely on the circumstance that their offences were committed in localities in which Virginia is claimed to have relinquished jurisdiction over Maryland citizens by treaty with Maryland.

We turn now to the Potomac river, on the western side of the Chesapeake bay. The tide-water portion of this great stream for a hundred and twenty miles from the Great falls at Georgetown to the Chesapeake bay constitutes the boundary line for that entire distance between Maryland and Virginia. Its fisheries for herring, mackeral, shad, and other running fish were for a long time highly valuable and are quite so still. There are oysters in the more brackish waters near its mouth, but the oyster interests of the Potomac have always been very inconsiderable. The relations of the

tide-water portions of the Potomac river to the two States made it necessary that there should be some compact as to its use between
Maryland and Virginia. Accordingly, on the 28th day of
81 March, 1785, under the auspices of General Washington, and
at Mt. Vernon, a compact was entered into which had the effect of a solemn treaty between these States. That compact is still in force except so far as the subsequent ratification by Virginia and Maryland of the Constitution of the United States may have modified and changed it.

Another portion of the boundary between the two States has always been a subject of much interest, to wit, that extending from the mouth of the Potomac across the Chesapeake bay and the Eastern shore or peninsula to the Alantic ocean. Until the final settlement in 1877 of this boundary line by Arbitrators Black and Jenkins, which was accepted by the two States and was ratified by Congress by the act of March 3rd, 1879 (see 20 U. S. Stat. at Large, page 481), this line was the subject of much controversy, more or less acrimonious, between the two States and their respective citizens.

One of the original subjects of contention was the exact locality of Watkins' point, which was ambiguously mentioned in Lord Baltimore's charter. This was fixed, however, at a very early date. It was determined by Commissioners Scarborough, of Virginia, and Calvert, of Maryland, in their report of March 28th, 1668, defining its position, and that position has never been changed, certainly not very largely changed. (The act of Congress just cited and the Code of Virginia, section 13, page 62, strangely refer to the Scarborough-Calvert line as marked by them in eighteen hundred and sixty-
eight, which, of course, are misprints.) Watkins' point thus
82 determined has remained from 1668 till now a cardinal point
in the boundary line of Maryland and Virginia. In regard to this point, which determined and continues to determine so large a section of the boundary line of the two States, the two Commissioners use the following language:

"After a full and perfect view taken of the point of land made by the north side of Pocomoke bay and the south side of Annamessex bay, we have and do conclude the same to be Watkins' point, from which said point, so called, we have run an east line agreeable with the extremest part of the westermost angle of said Watkins' point, over the Pocomoke river, to the land of Robert Holston's," etc., etc., etc., and "on into a marsh of the seaside."

That is to say, after fixing Watkins' point they ran a line from that point on Pocomoke bay to and "over Pocomoke river" eastward to the Atlantic ocean.

Not only is Watkins' point, as fixed or nearly as fixed by Scarborough and Calvert, still a cardinal point in the boundary, but the point at which these commissioners crossed over the Pocomoke river also remains an undisputed point of the line as it was fixed by them. In modern times this crossing has been ascertained to be at latitude 37° 59′ 39″, longitude 75° 37′ 4″. The line from Watkins' point to Pocomoke river, fixed by Scarborough and Calvert, skirted

the irregular northern shore of Pocomoke sound, taking in no navigable water except what is in the five miles of Pocomoke river below its intersection with the line, a fact which will be seen
83 in the sequel to have given a good deal of annoyance to
some of the citizens of Maryland. One of our objects in quoting — exact language from the report of Scarborough and Calvert is to show that at that day and by those two men of pre-eminent intelligence the bay and the River Pocomoke were spoken of and regarded as two distinct bodies of water.

From what has been said it is plain that while the two States had very important common interests in the Potomac river, which was a common boundary for a hundred and twenty miles, they had comparatively trifling common interests in the Pocomoke river, a stream that from 1668 to 1877 constituted no part whatever of a boundary between them and whose course in Virginia was less than five miles.

The petition of Wharton and Nelson praying for the writs of *habeas corpus* under which they are before this court recites, among other things, as follows: "By the seventh section (of the compact entered into on the 28th day of March, 1785, between the States of Maryland and Virginia) it is provided that:

§ 7. 'The citizens of each State, respectively, shall have full property in the shores of Potomac river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both States: Provided, that such common right be not exercised by the citizens of one State to the hindrance or disturbance of the fisheries on the shores of the other
84 State: and that the citizens of neither State shall have a
right to fish with nets or seines on the shores of the other.'

"By the eighth section of said compact it is provided that:

§ 8. 'All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the River Potomac or for preserving and keeping open the channel and navigation thereof, or of the River Pocomoke within the limits of Virginia, by preventing the throwing out of ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States.'"

The petitioners now before this court by their counsel contend that "by the true interpretation of the said seventh and eighth sections of the compact of 1785 the citizens of Maryland are lawfully entitled to possess and enjoy and exercise a common right of fishery, including the right to catch and take oysters in the Potomac river and in the Pocomoke river, including what is called Pocomoke sound, which is a part of said river, being, in fact, really the mouth thereof."

The petition thus claims that the provisions of the seventh section of the compact giving a common right of fishery in which the Potomac river only is mentioned, and the reasons for which provision were so strenuous as to make them necessary in respect to a great river forming for a hundred and twenty miles the boundary between the two States, is to be construed to apply also to a 85 small river not mentioned in the section, not then forming any part of the boundary, and as to which no such reason for the provision then existed in any degree. It founds this pretension on no conceivable ground other than the fact that the Pocomoke river is mentioned in section eight of the compact, in a clause subsequent to another clause requiring all laws and regulations for the preservation of fish in the Potomac, particularly described in that section, to be made with the mutual consent and approbation of both States.

It is apparent from the language of the petition that the validity of the defense in these cases depends upon the truth of several propositions, viz:

1st. That the seventh section of the compact of 1785 granted a common right of fishery to citizens of both States in the Pocomoke river despite the non-mention of that river therein.

2nd. That even if the seventh section did not by omitting the mention of Pocomoke river contain the grant, yet the eighth section did by implication and construction.

3rd. That the grant of a common right of fishery thus contained in sections seventh or eighth or both, in the Pocomoke river, carried the right into Pocomoke sound as part of Pocomoke river; and

4th. That the grant of a common right of fishery thus derived in Pocomoke sound—that is to say, of fishing for running fish, which until caught are *feræ naturæ* and not the subject of private ownership—embraces the right to scrape and dredge for oysters, not only on natural rocks in Pocomoke sound, but on the private 86 plantations granted and taxed there by the State of Virginia, *who* owns the water and the soil.

Section seventh defines two classes of subjects in relation to which the laws and regulations made by these States shall be of mutual consent and approbation. The first class embraces laws and regulations necessary for the preservation of fish and for the performance of quarantine in the Potomac river. The second embraces laws and regulations for preserving and keeping open the channel and navigation of the Potomac and also of the river Pocomoke within the limits of Virginia by preventing the throwing out of ballast or giving any other obstruction thereto.

The compact in section seven, having given common right of fishery in the Potomac river, followed up that provision with a clause requiring all laws and regulations for the protection of this common right in that river to be made with the mutual consent and approbation of both States; and Maryland and Virginia having in 1785 rights of navigation and commerce under the law of nations in the Potomac and Pocomoke rivers which were reciprocal in part, though not common in all, the compact naturally contained a provision requiring laws and regulations for keeping open the channel and navigation of the two rivers within the limits of Virginia to be made by mutual consent, the waters below the mouths of both rivers liable to obstruction being owned by Virginia.

There is nothing in section seven of the compact that can reasonably be held to give a common right of fishery in the waters
87 of the Pocomoke to citizens of Maryland and Virginia, whether running fish or shellfish, the Pocomoke river not being mentioned or referred to in the whole section, and the oyster interests in the Potomac having been so meagre that it can hardly be supposed that they were in the minds of the two States in stipulating for common rights of fishing in the Potomac.

After the adoption of the compact of 1785 the two States enacted laws for the preservation of fish and regulations for fishing in the Potomac river, having the sanction of mutual consent and approbation. They have not done so in respect to the Pocomoke river. Virginia has never enacted such laws, and it has not been shown in the evidence or argument that Maryland has ever proposed them. We are inclined to believe that Maryland has never enacted or proposed them.

For one hundred and eight years Virginia certainly and we believe Maryland also by their non-action have given practical refutation to the contention of counsel for petitioners that any grant of a common right of fishing in the Pocomoke river was intended in sections seven and eight of the compact.

On this subject Mr. I. Nevett Steele, of the Maryland bar, in an opinion written at the request of the governor of Maryland in respect to the present validity of the compact of 1785, remarks, after quoting section eight, as follows:

"The ordinary and grammatical construction of the section would manifestly limit the mutual or joint legislation over the River Pocomoke to the preserving and keeping open of the channel and navigation and would not extend it to the preservation of fish in the river."

88 "If this construction be correct there is nothing at all in the compact on the subject of fish in the Pocomoke, and consequently nothing upon which any claim of Marylanders to fish there could be founded. The compact by its previous clauses having given to Marylanders no right to fish in that part of the Pocomoke river belonging to Virginia, there seems to be no reason why it should give to Maryland the power to legislate for the preservation of fish in that part of the river."

We cannot accede, therefore, to the contention that because the State of Maryland has never consented to or approved the law of Virginia under which the petitioners, Wharton and Nelson, were convicted, therefore that law is inoperative and invalid as against them as citizens of Maryland in respect to offenses committed on the Pocomoke river. We are accordingly of opinion that section 2147 of the Code of Virginia is valid as against all offenders, including depredators from Maryland, in the water of Pocomoke river, though it has not the consent and approval of that State.

Though it is unnecessary after this ruling to consider the point, so strenuously urged by counsel for the petitioners, that the exemption, by operation of the eighth section of the compact of 1785, of offences committed in Pocomoke river by citizens of Maryland extends to those committed in Pocomoke sound, which is claimed to be part of the river, yet it is due to the subject, in view of the elaborateness with which the point has been pressed, to examine this claim of identity between the river and the Sound Pocomoke.

89 Considered either as a question of strict law or of historical fact, this contention, this claim of identity between these two bodies of water, is equallyuntenable. We have already shown by quoting from the report of Commissioners Scarborough and Calvert, made as far back as 1668, that they spoke of the bay and the river as two distinct bodies of water. We have examined all of the early maps of the waters and regions embracing this sound and river, and we do not think that in any of them the name river is laid upon the sound. In one of the oldest and best of the maps, that of Augustin Herrman, published in 1673, five years after the settlement of the boundary by Scarborough and Calvert, the bay and the River Pocomoke are laid down with considerable accuracy as distinct from each other and are separately designated, the one as Pocomoke bay and the other as Pocomoke river.

Coming down to modern maps, the case is the same, distinct designations appearing in them as sound and river, as in Herrman's map. The first edition of the chart made by the U. S. Coast Survey, published between 1850 and 1860, gives a clear delineation of Pocomoke river and a distinct one, from careful surveys, of Pocomoke sound, placing the name of Pocomoke sound upon the bay. Every later edition of this map of the coast survey exhibits this bay as a distinct body of water separately designated and distinguished from the river.

It is true that Maryland has long manifested a decided dissatisfaction with the boundary line of 1668 prescribed by Scarborough and Calvert, but her chief contention was that the
90
line should not have been placed so far north as to have left the whole of Pocomoke sound in Virginia. As the result in part of this dissatisfaction a commission was finally appointed to readjust the boundary lines, generally, between Maryland and Virginia. The commissioners were Jeremiah S. Black, Charles A. Jenkins, and James B. Beck, all men of distinction and enjoying the confidence of the public in the highest degree. The boundaries of the two States were settled by them in an award dated January 16th, 1877. This award was accepted by the two States and was ratified by Congress by its act of March 13th, 1879, hereinbefore cited. This settlement possesses every element of finality and unimpeachability. It has not only the unqualified acceptance of the two States, but has also the ratification of Congress at the instance of both States. It has the merit of extraordinary fullness, accuracy, and clearness of description in setting out the lines of boundary which it establishes. It leaves not in doubt a single point or a single line confusedly or inaccurately delineated. Observe how precise its language is in defining the line east of Watkins' point, with which we have to do in the case at bar, and that Mary-

land is given part of Pocomoke sound by the fixing of the line far enough below that of Scarborough and Calvert to leave a strip of the sound about a mile wide for a distance of fourteen miles within her limits. The arbitration of 1877 in respect of that part of the boundary line which lies east of Watkins' point, after fixing that point at latitude 37° 54′ 38″, longitude 75° 52′ 44″, goes on to say with great precision of description, "From Watkins'
91 point the boundary line runs due east 7,880 yards to a point
where it meets a line running through the middle of Pocomoke sound which is marked C on the accompanying map and is in latitude 37° 54′ 38″, longitude 75° 47′ 50″; thence by a line dividing the waters of Pocomoke sound north 47° 30′ east 5,220 yards to a point in said sound, marked D on the accompanying map, in latitude 37° 56′ 25″, longitude 75° 45′ 26″; thence following the middle of the Pocomoke river by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert May 28th, 1868, at a point in the middle of Pocomoke river and in the latitude 37° 59′ 37″, longitude 75° 37′ 4″; thence by the Scarborough and Calvert line, which runs 5° 15′ north of east, to the Atlantic ocean." The misprint of 1868 for 1668 has already been adverted to.

This language of the Black-Jenkins award of 1877 has been quoted for two purposes—first, in order to show that this latest historical document relating to this boundary—just as that of 1668 had done—particularly distinguishes the sound from the River Pocomoke by two distinct mentionings of each, and, secondly, to show that the settlement of 1877 left no part of this portion of the boundary between the two States "doubtful."

It is proper to observe that the U. S. Coast Survey, in its maps, has extended the River Pocomoke, so called, westward of its proper mouth to the narrows abreast of Meramscot creek, which is twelve miles south and southwest of the crossing of the river by the
92 Scarborough-Calvert and Black-Jenkins line. It is to be also
observed that the Black-Jenkins award adopts the map of the U. S. Coast Survey in designating the boundary line east of Watkins' point, and, in designating the river as distinct from the bay, makes the river commence nearly abreast of Meramscot creek.

In concluding this part of the subject, we think we can say with truth that there is no map of these waters and no joint official document existing in relation to them which has confounded the river with the sound or claimed that the sound is the river or any part of the River Pocomoke.

We conclude from what has been said that the eighth section of the compact of 1785 does not require that the laws and regulations established by Virginia for the preservation of fish, more particularly shell-fish, in the Pocomoke river shall have the consent and approbation of Maryland, and that, even if it did so, such requirement cannot be applied to Pocomoke sound, which is not the river, is no part of it, and is immeasurably superior to it in value and importance. This sound is ninety square miles in area, containing the most valuable oyster beds in Virginia or Maryland, and is of such extent and importance as to forbid the supposition that Virginia would have granted away her jurisdiction over it in any other than express, precise, formal, and solemn terms.

There having been no grant of a common right of fishing in the Pocomoke river, no right can be derived, by inference, of common fishing in Pocomoke sound; and, there having been no grant of a common right of fishing for fish either in the river or the
93 sound, there can be no right derived, by inference, of common fishing for oysters in either of these waters.

If Virginia had intended to grant away the valuable rights now claimed by Maryland it is fair to assume that she would not have subjected the beneficiaries of the grant to the necessity of resorting to extraordinary inferences and constructions for realizing and enjoying the fruits of the grant. It would have been her duty to have used apt and proper words for executing her purpose and to have been just as explicit and frank in the language of the eighth section of the compact as she was in that of the seventh.

In support of their contentions, based on section eight of the compact of 1785, which have been shown to be inadmissible in the foregoing paragraphs, counsel for the petitioners cite the language of one of the judges in the decision of the supreme court of appeals of Virginia in the case of the Commonwealth *v.* Hendricks, reported in 75 Virginia, 934. In that case George Hendricks, a citizen of Maryland, was indicted in the county court of Fairfax county for "unlawful fishing" in the Potomac river. He contended that he was entitled to be tried in a court in Maryland and could not be tried in a court of Virginia, because the law which he was charged with violating had been passed by the mutual consent and approbation of both States for the regulation of fishing in the Potomac river and because another law, passed by like mutual consent, had given citizens of Maryland violating the first-named law the right of trial in a Maryland court. His contention was perfectly sound, and the Virginia court of appeals sustained this
94 defense. The trial related exclusively to the Potomac river. It involved the question of the common right of fishery in that river given by the seventh section of the compact of 1785. It also involved certain laws and regulations passed by both States for the protection of that common right of fishing in the Potomac river passed in pursuance of the first clause of section eight of that compact. There was no question in the case concerning Pocomoke river, but the justice delivering the opinion of the court, in examining the question of the jurisdiction of the two States over an offense charged to have been committed on the Potomac river, used the following language:

"By article 8 all laws and regulations which may be necessary for the preservation of fish in the river Potomac or the river Pocomoke within the limits of Virginia shall be made with the mutual consent and approbation of both States. The effect of this article is to give to the State of Virginia concurrent jurisdiction with the State of Maryland over the Potomac from shore to shore and over that part of the Pocomoke river which is within the limits of Virginia, to enact such laws, with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters."

The court here refers to section eight of the compact of 1785 without quoting it, although the mere quotation of it would have shown the fallacy of its language in respect to the Pocomoke river. So far as the Pocomoke river was concerned, the language of the court was
obiter dictum upon a point not argued or even mentioned in
95 the case, and Mr. Steele, in his opinion written for the gov-
ernor of Maryland, before referred to, very naturally says: "I think it may well be doubted whether the court of appeals of Virginia would consider what is there said about the Pocomoke river as a binding decision of that learned tribunal."

Few instances can be cited in which the *obiter* of a court has sown the seeds of greater mischief than this of the Virginia court of appeals in the Hendricks case. It has instigated the depredations of Marylanders upon the private oyster properties of Pocomoke sound, of which the newspapers are full. It has brought these cases before this court, yet in using the language of the *obiter* part of its decision the court did not hold that Pocomoke sound was Pocomoke river, and its *obiter* has no application to the case at bar; nor did the court say that the eighth section, in what it stipulated in regard to a common right of fishery, "included the right to take oysters in the Pocomoke river."

The petitions of Wharton and Nelson must be disallowed and the prisoners remanded to the custody of the sheriff of Accomack county.

Coming now to the consideration of the case of Marsh, it is to be observed that his offense is charged to have been committed on Hurley's rock, which the indictment alleges to be within the limits of Virginia, near the line of boundary, lying between Smith's point, on the Potomac, and Watkins' point. The defense is that that part of the boundary is "doubtful," and that the prisoner is entitled to the privilege granted by the tenth section of the compact of
1785, which stipulated that offenses committed by citizens
96 of Maryland within the limits of Virginia on that part of
Chesapeake bay where the line of division between Smith's point and Watkins' point may be doubtful, shall be tried in a court of Maryland. As a matter of historical fact, no part of the line between Maryland and Virginia was at the date of the compact of 1785 more doubtful than the part between Smith's and Watkins' points, and no law could be more just and judicious than the tenth section of the compact of 1785, containing the provisions relied on. But the able and distinguished commissioners appointed by the two States in 1877 had in charge the very duty of making certain and determinate all doubtful parts of the common boundary of the two States. Accordingly the commission addressed itself to the task of removing all doubt from this part of the line as well as others, and accomplished its purpose successfully. Probably no section of a boundary line was ever more clearly, precisely, minutely, definitely, or intelligibly laid down and defined than was the portion of the

Maryland and Virginia line between Smith's and Watkins' point- and which may be found on pages 63-'4 of the Virginia Code and page 482 of the 20th volume of the Statutes at Large of the United States.

It is useless in this opinion to set out the careful language of the award in defining this line. The duty of the arbitrators was to make it cease to be doubtful and to establish the line with precision and certainty. They performed that duty and accomplished that purpose. The line is no longer doubtful, and the defense of the prisoner Marsh is inadmissible. It was competent for the
97 Virginia court, by which he was convicted, to try him, and he must be remanded to the custody of the sheriff of Accomack county, Virginia.

98 The following notice, with the endorsement thereon, was filed in the papers of this cause as of its date:

BALTIMORE, *October 2nd*, 1893.

Hon. R. Taylor Scott, att'y gen'l of Virginia.

SIR: Please take notice that I have prayed an appeal to the Supreme Court of the United States in the case of Wharton's petition for *habeas corpus* in the circuit court of the United States for the eastern district of Virginia, and which writ was dismissed by order of the court on the 15th day of September, 1893, and the prisoner and petitioner remanded to the custody of the sheriff of Accomack county, Virginia, from which he had been taken under said writ.

Yours resp'y, JOHN P. POE,
Att'y Gen'l of Md., Appearing for the
Petitioner and on Behalf of the State.

Endorsed: "Service of this notice accepted. R. Taylor Scott, att'y gen'l of Virginia."

And at another day, to wit, on the 2nd day of October, 1893, came the petitioner, by counsel, and filed his petition for an appeal
99 to the Supreme Court of the United States, which petition, together with the order of court thereon, is as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte ROBERT L. WHARTON: On Petition for *Habeas Corpus.*

To the honorable the judges of said court:

The petitioner, Robert L. Wharton, respectfully shows that he is restrained of his liberty in violation of the Constitution and laws of the United States, and that this court has finally decided not to release him from said restraint and has dismissed the writ of *habeas corpus* heretofore issued in his behalf and has remanded him to the custody from which he was taken.

He therefore prays an appeal from said decision to the Supreme Court of the United States.

And, as in duty, &c.

JOHN P. POE,
Att'y Gen'l of Maryland,
BRADLEY T. JOHNSON,
Special Counsel of Maryland,
THOMAS S. HODSON,
Att'ys for the Petitioner.

The order of the court on the foregoing petition, entered on the said 2nd day of October, 1893, is as follows, viz:

100 *Order Allowing Appeal & Admitting Petitioner to Bail.*

Ordered by the circuit court of the United States for the eastern district of Virginia this 2nd day of October, 1893, upon the aforegoing petition that the appeal therein prayed to the Supreme Court of the United States be granted, and that the said Robert L. Wharton enter into his recognizance, with satisfactory security, in the sum of one thousand dollars to appear in this court and to abide by the judgment thereof on the first day of its November term, 1894, and that R. S. Cohn and J. T. White be received as such sureties.

RO. W. HUGHES, *Judge.*

The bond required by the aforegoing order was duly approved and filed in this cause on the 2nd day of October, and is in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte ROBERT L. WHARTON and SEVERN NELSON.

The defendants, Robert L. Wharton and Severn Nelson, as principals, and R. S. Cohn and J. T. White, sureties, acknowledged themselves to be indebted to the United States of America as follows, the said Robert L. Wharton and Severn Nelson in the sum of one 101 thousand dollars each and the said R. S. Cohn and J. T. White in the sum of one thousand dollars each, to be levied on their respective goods and chattels, lands and tenements, for the use of the said United States of America, but to be void if the said Robert L. Wharton and Severn Nelson shall personally appear in this court on the first day of the November term, 1894, and surrender themselves into custody and not depart thence without leave of this court.

ROBERT L. WHARTON.
SEVERN NELSON.
R. S. COHN.
J. T. WHITE.

Taken and acknowledged before me this 2nd day of October, 1893.

H. S. ACKISS,
U. S. Comm'r.

Assignment of Errors.

1.

The court erred, as a matter of law, in its decision and in its decree dated the 15th day of September, 1893, in holding that by the true interpretation of the compact of 1785 between Virginia and Maryland the citizens of Maryland do not now possess and are not entitled to enjoy freely a right of fishery and a right to take oysters in common with the citizens of Virginia in the Pocomoke river.

102 2.

The court erred, as a matter of law, in holding in its decision (and virtually by its decree, dated the 15th day of September, 1893, founded upon said decision) that the act of the legislature of Virginia under which the petitioner was arrested, indicted, and convicted was valid, although it had not been adopted, ratified, and enacted by concurrent legislature on the part of Maryland, and that the arrest and conviction of the petitioner thereunder was valid, the petitioner being a citizen of Maryland at the time the alleged offense was committed.

3.

The court erred, as a matter of law, in holding that the petitioner could be lawfully tried in the courts of Virginia for the offense charged, he being at the time of its alleged commission a citizen of Maryland.

4.

The court erred, as a matter of fact, in its decision and decree based thereon, dated the 15th day of September, 1893, in holding that the Pocomoke sound as it now exists is not the same body of water as Pocomoke river in the compact of 1785 aforesaid between Virginia and Maryland.

JOHN P. POE,
Att'y Gen'l of Maryland,
BRADLEY T. JOHNSON,
THOS. S. HODSON,
Att'ys for Petitioner.

103 *Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Robert L. Wharton, on his petition for the writ of *habeas corpus*, and John H. Wise, sheriff of Accomack county, Virginia, a manifest error hath happened, to the great damage of the said Robert L. Wharton, as by — complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, in the District of Columbia, together with this writ, so that you have the same at Washington city on the eighth day of November next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, Eastern District of Virginia.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the second day of October, in the year of our Lord one thousand eight hundred and ninety-three.

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Allowed by—
RO. W. HUGHES, *Judge.*

104 *Certificate.*

UNITED STATES OF AMERICA, *Eastern District of Virginia,* } *ss:*

Ex Parte ROBERT L. WHARTON: On Petition for Writ of *Habeas Corpus.*

I, M. F. Pleasants, clerk of the circuit court of the United States in and for the eastern district of Virginia, hereby certify that the foregoing is a true and—except in those particulars mentioned in the agreement of counsel incorporated in the record—complete transcript of the record and proceedings in the above-entitled cause as the same remains on the files of my said office.

Seal United States Circuit Court, Eastern District of Virginia.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this 27th day of October, A. D. 1893, and in the year of our Independence the 118th.

M. F. PLEASANTS,
Clerk of U. S. Circuit Court, Eastern District of Virginia.

Endorsed on cover: Case No. 15,438. E. Virginia C. C. U. S. Term No., 1054. Robert L. Wharton, appellant, *vs.* John H. Wise, sheriff of Accomack county, Virginia. Filed October 30th, 1893.

Supreme Court U. S.
FILED,
FEB 27 1894
JAMES H. McKENNEY,
CLERK.

153-155

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1893. No. 1054.

ROBERT L. WHARTON,

vs.

JOHN H. WISE,
Sheriff of Accomack County, Virginia.

APPELLANTS' BRIEF.

JOHN PRENTISS POE,
Attorney Gen'l of Maryland,

BRADLEY T. JOHNSON,
Special Counsel for Maryland,

THOMAS S. HODSON,
Attorneys for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893. **No. 1054.**

ROBERT L. WHARTON,

vs.

JOHN H. WISE,

Sheriff of Accomack County, Virginia.

APPELLANT'S BRIEF.

At the session of 1890, the General Assembly of Maryland passed the following Act:

An Act to direct the Attorney General of the State to take such steps as are necessary, to obtain a decision of the Supreme Court of the United States, as to the scope and effect of the "compact" of seventeen hundred and eighty-five, and to employ additional counsel, with approbation of the Governor, and to appropriate a sum of money therefor.

Section 1. Be it enacted by the General Assembly of Maryland, that the Attorney General of the State be and he is hereby authorized and directed to take such steps as may be necessary and proper to obtain, as soon as possible, a decision of the Supreme Court of the United States, as to the scope and effect of the "compact" of seventeen hundred and eighty-five, signed at Mt. Vernon, between the commissioners of Maryland and Virginia, whether or not it applies to that body of water now called "Pocomoke sound," through which the boundary line between Maryland and Virginia now passes, and whether or not the citizens of Maryland have a right to take oysters in said waters, jointly with the citizens of the State of Virginia, a right which the citizens of Maryland have enjoyed from date of said "compact," until about the year eighteen hundred and eighty-three, without molestation, and with the assent of Virginia, as agreed upon in said compact, and which is now denied them by the oyster police force of that Commonwealth, acting under the laws of the same; and that he is hereby authorized to employ additional counsel to assist in a suit for that purpose, and that the sum of fourteen hundred dollars, remaining from the sum appropriated for this purpose by the Act of eighten hundred and eighty-four, chapter three hundred and fifty-four, or so much thereof as may be necessary, be and is hereby appropriated for the payment of the expenses and fees of said counsel, to be determined by the Governor and Attorney General, on whose joint certificate the Comptroller shall issue his warrant on the Treasurer for the same or any part thereof.

Although the denial to citizens of Maryland by the authorities of Virginia of rights long exercised without question, as asserted in the above Act, naturally gave rise to much feeling and tended to disturb the harmonious relations between the people of the two States, still no *case* appears to have arisen for the presentation for judicial decision of the questions at issue, until the indictment in March, 1893, of the appellant, Robert L. Wharton, a citizen of Maryland, by the grand jury of Accomack county, Virginia, for the alleged unlawful taking and catching of oysters on Ledge Rock, in Pocomoke sound, Virginia, on 24th February, 1893. Upon his trial in April, 1893, it was contended on his behalf, that as a citizen of Maryland, he had a lawful right, by virtue of the compact of 1785, between Maryland and Virginia, to take oysters in the *locus in quo;* that the Statute of Virginia under which he was indicted was void as to citizens of Maryland, because it had not been made with the assent and concurrence of Maryland, as required by the compact, and that under the compact the Virginia Court had no jurisdiction to try and punish him for the alleged offence.

These defences were presented by appropriate pleadings (Record, 1-10,) but they were all decided to be insufficient, and the appellant was thereupon convicted and sentenced to pay a fine of $500 and costs, and to be imprisoned in the county jail until the fine and costs should be duly paid or until he should be discharged by due course of law. (Record, 4, 8.)

With a view to obtain a final decision by this Court of the questions in dispute between the two States, the appellant applied to the Circuit Court of the United States for the Eastern District of Virginia, for a writ of habeas corpus, setting out in his petition quite fully the grounds upon which his imprisonment was claimed to be illegal and contrary to the Constitution and laws of the United States.

The writ was issued, but after argument, the Court (Judges Goff and Hughes) dismissed it, and remanded the appellant to the custody of the Sheriff of Accomack county. (Record, 53.) The reasons for their judgment are given in an elaborate opinion. (Record, 53-65.)

The appeal is from this order.

POINTS.

For the appellant it will be argued:

I.

That the compact of 1785, between Virginia and Maryland, is still a subsisting agreement, binding upon and enforceable by each of these States, and the citizens thereof, according to its true interpretation, except in so far as some of its provisions have been superseded by the Constitution of the United States.

II.

That by the true interpretation of those parts of such compact as are still in force, the citizens of Maryland now possess and are entitled to enjoy freely a right of fishery, including the right to take oysters, in common with the citizens of Virginia, in the Pocomoke river.

III.

That the Pocomoke river, as mentioned in the compact of 1785, embraces what is now commonly called Pocomoke sound, which is nothing but the mouth of Pocomoke river.

IV.

That inasmuch as the Statute of Virginia under which the appellant was arrested, indicted and convicted was never adopted and enacted by concurrent legislation of Maryland, as stipulated in the compact, it was and is inoperative by virtue of that compact, as against citizens of Maryland, and that, therefore, the conviction thereunder of the appellant, who was and is a *bona fide* citizen of Maryland, was illegal and void.

V.

That assuming, but not conceding, that the citizens of Maryland do not possess and are not entitled to a free right of fishery, including the right to take oysters, in common with the citizens of Virginia, in Pocomoke river, and assuming further that Pocomoke river, as mentioned in the compact, does not embrace Pocomoke sound, and assuming further that the statute of Virginia in question, did not require the concurrence of Maryland in order to render it operative as against citizens of Maryland, still under the tenth section of the compact, the appellant as a citizen of Maryland could not lawfully be tried in the Courts of Virginia for an alleged violation of that statute, but was entitled to be tried in the Courts of Maryland, and that consequently his trial and conviction in Accomack County Court was illegal and void.

VI.

That being thus unlawfully deprived of his liberty, contrary to the constitution and laws of the United States, by the void judgment of a Court which had no jurisdiction to try him, and being unable in any other mode to obtain a proper hearing of his case, and a release from such unlawful judgment and imprisonment, the Court below, upon petition of the appellant for the writ of habeas corpus, had ample jurisdiction to order his discharge, and should have done so upon the case made. And that consequently the order of the Court below, dismissing the writ and remanding the appellant to the custody of the sheriff, was erroneous and should be reversed.

I.

As to our first proposition, viz., that the Compact of 1785 is still a subsisting and valid agreement, except in so far as superseded in some particulars, by the Constitution of the United States, it is to be observed that the Court below in their opinion concede this.

The question however is an important one, and is respectfully submitted upon the reasoning and force of the following opinion of the late I. Nevett Steele, Esq., of the Baltimore Bar, given in December, 1885, to Governor Lloyd, of Maryland:

"The Compact of 1785, between the States of Virginia and Maryland, was negotiated by commissioners appointed by the two States, respectively, and was approved, confirmed and ratified by each State by a Statute enacted for that purpose. The Statute of Maryland, being Chapter 1 of the Acts of Assembly of 1785, recites the compact at length, and enacts in accordance with the Thirteenth Article of the Compact, 'That the said compact is hereby approved, confirmed and ratified,' and that upon its ratification by Virginia, 'every article, clause, matter and thing in the same compact contained, shall be obligatory on this State and the citizens thereof, and shall be forever faithfully and inviolably observed and kept by this government and all its citizens, according to the true intent and meaning of said compact; and the faith and honor of this State, is hereby pledged and engaged to the General Assembly of the Commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by the Legislature of this government, without the consent of the government of Virginia.'

"It will be observed that this compact was made while the Articles of Confederation, adopted by the States in 1778, were in force. These articles having proved altogether inadequate to secure the well being and safety of the States, the Constitution of the United States was formed in 1787, and was ratified by Virginia and Maryland, and nearly all the States, in 1788.

"The compact contained various provisions in reference to the jurisdiction over and the navigation of the Potomac and Pocomore rivers, and certain parts of the Chesapeake bay, and also certain stipulations as to the right of fishery and the making of laws and regulations for preserving fish.

"Without undertaking to examine or discuss the justice or propriety of the terms of this compact, it may be observed in passing, that some agreement in reference to the matters which it covered was certainly proper and necessary, to prevent controversy and collision between the two States and their respective citizens.

"The boundary between the two States, which was largely connected with the waters of the Potomac and Pocomoke rivers, and the Chesapeake bay, was unsettled and in dispute; the geographical position of those waters made their use essential and necessary to the citizens of both States, and Congress, under the Articles of Confederation, had no power whatever to legislate upon the subject.

"The two States, under these circumstances, to preserve friendship and harmony between them, and to promote their mutual well-being, deemed it wise and just to enter into this compact.

"Afterwards, Virginia and Maryland each ratified the Constitution of the United States, by which the power 'to regulate commerce,' &c., was conferred upon Congress. This power is held to include the power to regulate navigation on the navigable waters of the country, thus devolving upon the Federal Government the general duty of securing and protecting the right of all the people of the country to the navigation of such waters.

"It follows that any constitutional legislation of Congress on the subject of Commerce or Navigation, in so far as it is inconsistent with any of the provisions of the compact, supersedes such provisions. (See Cooley on Constitutional Limitations, page 591.)

"Looking now to the legislation of this State, I find that an Act of Assembly of 1856, chapter 130, amendatory of the Act of 1854, 'to regulate fisheries in the waters of the Potomac,' by its second section enacted: 'That this Act and the Act to which this is amendatory, shall take effect from and after the concurrence of the State of Virginia, by the passage of a law with like provisions, to protect the fisheries in the waters of the Potomac river within the jurisdiction of Virginia.'

"In the Code of Public Laws adopted in January, 1860, article 41, sections 12 to 20, will be found the then statutory provisions of this State, in reference to fishing on the Potomac river, and the 20th section expressly declares that 'the provisions of this article in reference to fishing on the Potomac river, shall be of no force or validity unless the same shall have been or shall hereafter be adopted by the State of Virginia, or similar laws be passed by that State in relation to said river.'

"This concession to Virginia of the right to unite in this legislation, and the making her consent necessary to its validity, seem clearly to recognize as in force and obligatory, that clause of the Compact of 1785, which provides that 'All laws and regulations which may be necessary for the preservation of fish * * * in the river Potomack * * * shall be made with the mutual consent and approbation of both States.'

"Then the Act of 1870, chap. 205, amends, re enacts and adds to the provisions of the Article 41 of the Code, in reference to fishing on the Potomac, and by its last section provides that 'In case the State of Virginia shall adopt a law similar in its provisions to this Act, citzens of either State when arrested for the violations of the provisions of this Article * * * shall be delivered up for trial to the police force * * * of the State of which the offender was a citizen.'

"This amendment of Article 41 of the Code would necessarily be subject to the 20th section quoted above, which would require the consent of Virginia to give it force and validity.

"Then came the Act of 1872, chap. 292, by which this 20th section of Article 41 was repealed.

"At the next session of the Legislature the Act of 1874, chap. 247, entitled 'An Act to designate the arbitrators to ascertain and fix the boundary between the States of Virginia and Maryland,' was passed, a similar law having already been passed by Virginia.

"This was followed by the Act of 1876, chap. 198, appointing James B. Beck as arbitrator in the place of William A. Graham, deceased. Both of these Acts carefully reserve and retain all rights of the State or its citizens under the compact of 1785, and I shall hereafter examine them more fully.

"After this the Act of 1880, chap. 36, entitled 'An Act to regulate the catching of oysters in the waters of the Potomac river,' was passed by the Maryland Legislature, and by its 23d section provided 'that this Act shall take effect upon the approval of this Act, and the passage of a similiar Act by the State of Virginia.'

"And again, by the Act of 1880, chap. 445, entitled 'An Act to protect oysters in the waters of Pocomoke sound in Somerset county,' it is by its fifth section enacted 'That this Act shall take effect upon the consent and ratification of the provisions of this Act by the Legislature of the State of Virginia, as required by the compact between the States of Virginia and Maryland in the year seventeen hundred and eighty-one.' The word 'one' here seems evidently to be a mistake, and the reference intended was no doubt to the Compact of 1785.

"Next comes the Act of 1882, chap. 391, 'An Act to regulate the taking and catching of oysters in the Potomac river, within the boundary lines of the State of Maryland,' which does not by its terms require the assent of Virginia or the enactment of a similar law by her; and then in 1884, chap. 76, an Act entitled 'An Act to regulate the taking of oysters in the Potomac river' was passed, which by its 6th section, provides that it shall go into effect as soon as it is adopted by Virginia, and by its 7th section enacts that 'nothing in this Act shall be construed in any way to impair, alter or abridge any rights which either State or the citizens thereof may be entitled to, either by, through, under or against the Compact of 1785.'

"The State of Virginia has always claimed and declared by her legislation, that the Compact of 1785 remained obligatory, except so far as it may have been superseded by the provisions of the Constitution of the United States. (See Revised Code of Virginia of 1819, and subsequent Codes.)

"When the laws of Maryland have, by their terms required the assent of Virginia to give them effect and validity, Virginia has more than once given that assent, by the adoption of those laws, or by passing similar laws, and so far as I can learn, the citizens of Virginia have claimed and exercised the right of fishing in the Potomac river ever since the Compact of 1785.

"And now, after the lapse of a century and after the legislation above referred to, the question is presented whether the compact, in so far as it has not been superseded by the operation of the Constitution of the United States, is now valid and obligatory between the two States. I am of opinion that it is, and that the State of Maryland cannot now rightfully or successfully allege and maintain its invalidity before the Supreme Court of the United States.

"The objections suggested to the validity of the compact are founded on the articles of confederation in force when the compact was made, and on the Constitution of the United States subsequently ratified by both States.

"The second clause of the 6th article of the articles of confederation provides that 'no two or more States shall enter into any *treaty, confederation or alliance* whatever between them without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.'

"The Constitution of the United States provides, by Article 10, that 'No State shall enter into any treaty, alliance or confederation,' and also that 'No State shall, without the consent of Congress * * * enter into any *agreement* or *compact* with another State or with a foreign power.'

"It is suggested that the compact was originally invalid and a nullity under and by force of the prohibitory clause of the Articles of Confederation, or afterwards became invalid and of no effect by the operation of the prohibitory clause in the Constitution of the United States.

"That Virginia and Maryland, Pennsylvania and New Jersey and Pennsylvania and Virginia, entered into such compacts during the Confederation, in reference to boundary and the rights of landholders on the disputed territory; and in reference to riparian rights, rights of fishery, and of navigation and jurisdiction over waters lying between the two States, or partly in one and partly in the other, indicates very clearly that the Legislatures of those States deemed such compacts valid between the States making them, without the consent of Congress having been obtained. The Legislature of Virginia expressly decided not to apply for such consent. (Madison Papers, Vol. 2, page 712.)

"Now, the first question which presents itself is, whether the compact was 'a treaty, confederation or alliance,' within the true meaning of those words as used in the Articles of Confederation, and it seems probable that there was a difference of opinion on this question among the public men of the time. Mr. Madison in the Constitutional Convention of 1787, while seeking to show the necessity for a stronger government, mentioned this compact as one among other instances of encroachment by the States on the authority of Congress, but in the Constitution which he contributed so wisely and largely to construct and establish, we find a distinction clearly drawn between 'a treaty, alliance or confederation' and an 'agreement or compact.'

"It provides absolutely in the first clause of Article 10, that 'No State shall enter into any treaty, alliance or confederation,' and in the second clause of the same article provides that, 'No State shall, without the consent of Congress * * * enter into any agreement or compact with another State or with a foreign power.' Manifestly then, under the Constitution, the words 'treaty, alliance or confederation,' do not mean the same thing as an 'agreement or compact,' for the former are absolutely prohibited, while the latter are permitted with the consent of Congress.

"The distinction thus made between the words 'treaty, alliance or confederation' and the words 'agreement or compact, by the framers of our Constitution, sitting while the Articles of Confederation were still in force; and their collective judgment that in order to reach 'agreements or compacts' between the States, it was proper to insert those words in the Constitution, would seem to be very strongly authoritative as to the meaning of the prohibitory clause in the Articles of Confederation.

"In this connection, I may refer to the case of Holmes vs. Jennison, 14 Peters, 571, where Chief Justice Taney, speaking for himself and Justices Story, McLean and Wayne, uses the following language in reference to the clauses of Article 10, of the Constitution: 'When, therefore, the second clause declares that no State shall enter into any 'agreement or compact' with a foreign power without the assent of Congress, the words 'agreement' and 'compact' cannot be construed as synonymous with one another; and still less can either of them be held to mean the same thing with the word 'treaty' in the preceding clause, into which the States are positively and unconditionally forbidden to enter; and which even the consent of Congress could not authorize.'

"But, further, Virginia and Maryland were sovereign States, recognizing no common superior. They had formed a league or confederation with other States, by the 2d Article of which, 'each State retains its sovereignty, freedom and independence, * * * &c.,' and by the 3d Article: 'The said States hereby severally enter into a firm league of friendship with each other for their common defense, * * * &c.'

"The confederation was then but a league, without the powers essential to constitute a government, and was, as it has well been called, a rope of sand.

"There was no Constitution, no Federal Government supreme within its sphere, with its Executive, Legislative and Judicial

Departments; there was only a league, and each Sovereign State was necessarily left to decide for itself as to the true construction of the Articles of Confederation.

"When, therefore, Virginia and Maryland entered into this compact, even if other States should say that in their opinion it was a breach of good faith towards them, and on this ground should refuse to recognize its validity, if it affected their interests; yet it would not lie in the mouth of either of the two States, who, upon their construction of the Articles of Confederation, had themselves made and entered into the compact, to allege its validity on that ground.

"They could not complain that there was any breach of good faith toward themselves.

"In this connection I may observe that neither Mr. Madison nor any other member of the convention which formed the Constitution of the United States, declared these compacts to be invalid, but spoke of them as encroachments on the authority of Congress. This is scarcely the language they would have used if the compacts had been regarded as nullities.

"And when the Confederation came to an end, and the Articles of Confederation were blotted out of existence by the adoption of the Constitution, the Compact of 1785 remained on the statute books of the two States, without having been annulled or set aside by the States or any other power.

"Next, the compact was not affected or made invalid by the prohibitory clause contained in the Constitution of the United States. That clause provides that 'No State shall * * * enter into any agreement, &c.' It is prospective by its terms and not retrospective. Its language and the established principles of construction alike forbid that it should be applied to pre-existing compacts or agreements. As to them, the only effect of the Constitution is to supersede any stipulations in them relating to subjects, over which the Constitution by its provisions give exclusive control and jurisdiction to the General Government. Thus the stipulations in the Compact of 1785, in reference to commerce and navigation, were superseded by the control given to Congress over those subjects, but its stipulations as to riparian rights, rights of fishery and of jurisdiction on or over the waters lying between the two States, were left untouched. No control over these matters was given to Congress, and I do not think that by the voluntary action of the two States in ratifying the Constitution, they made inoperative any more of the compact, than such part of it as was inconsistent with and superseded by that instrument.

"The aforegoing considerations in reference to the operation and effect of the articles of confederation and the Constitution of the United States, are suggested not as a full or exhaustive argument of the question involved, but as properly preliminary to the citation of authorities by which this Compact of 1785, and others of the same character have been recognized, upheld or enforced by Courts of the highest jurisdiction, without any intimation that they were invalid or of doubtful validity.

"Beginning with our own State, I find that in 1829 in 'Binney's Case,' 2 Bland, 126–127, Chancellor Bland, a very learned and exhaustive investigator of all matters coming before him, examined and construed the Compact of 1785, as an existing compact, without suggesting a question as to its validity.

"Next, we have the case of 'The State vs. Hoofman' decided by our own Court of Appeals in 1856, 9 Maryland Rep. 28–30. Hoofman was indicted for a violation of the Act of 1845, chap. 145, which was 'An Act to preserve the breed of fish, and to regulate and protect fishing in the Potomac river, &c.'

"The Act contained no provision that the assent of Virginia was required to give it validity. Hoofman demurred to the indictment, and the Court below sustained the demurrer, and upon appeal the Court of Appeals said, 'the question for decision is whether it was necessary to aver and prove that the Legislature of Virginia had assented to our Act of Assembly.' The eighth article of the compact between the States recited in the Act of 1785, chap. 1, declares that 'all laws and regulations which may be necessary for the preservation of fish in the river Potomac shall be made with the mutual consent and approbation of both States.' It follows that our Act of 1845 could have no operation until assented to as required by the compact. And as the Court must take notice of the compact, as well as the Act of 1845, the indictment was defective in not informing the Court that the assent of Virginia, of which they had no judicial knowledge, had been obtained. Here we have a direct enforcement of the compact as valid and obligatory.

"So the Court of Appeals of Virginia in the case of Hendricks vs. Commonwealth, 75 Virginia Rep., 934, recognizes the compact as existing, and construes some of its provisions.

"Turning now to decisions in the Courts of the United States, we find that in 4 Cranch, Circuit Court Reports., page 238, the compact was considered and construed by the Circuit Court without a question as to its validity.

"Next, we have the case of The City of Georgetown vs. The Alexandria Canal Co., decided by the Supreme Court of the United States, and reported in 12 Peters, 91. The City of Georgetown asked for an injunction to prevent the Canal Co. from making certain improvements in the Potomac river. The contemplated improvements were within the District of Columbia, which had been ceded by Virginia and Maryland to the United States, and the Canal Co. was acting under a charter from Congress, granted in 1830. It was contended for the complainant, that the acts of the Canal Co. were in violation of the Compact of 1785, and on this subject the Supreme Court speaking in 1838, say on page 96: 'We shall forbear also from any expression of opinion upon some of the topics discussed at the bar; because, whilst they are important in their character, they have no bearing upon the principles on which our judgment proceeds.

"We will now very briefly state them, and the conclusions which necessarily flow from them. The compact made in the year 1785, between Virginia and Maryland, was made by the two States, in their character as States. The citizens, individually, of both commonwealths, were subject to all the obligations imposed, and entitled to all the benefits conferred by that compact. But the citizens as such, individually, were in no just sense the parties to it; those parties were the two States, of which they were citizens. The same power which established it, was competent either to annul or to modify it. Virginia and Maryland, then, if they had retained the portions of territory respectively belonging to them on the right and left banks of the

Potomac, could have so far modified this compact as to have agreed to change any or all of its stipulations. They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever.

"When they ceded to Congress the portions of their territory, embracing the Potomac river, within their limits, whatsoever the Legislatures of Virginia and Maryland could have done by their joint will, after that cession could be done by Congress; subject only to the limitations imposed by the acts of cession.

"We are satisfied, then, that the Act of Congress, which granted the charter to the Alexandria Canal Company, is in no degree a violation of the compact between the States of Virginia and Maryland, or of any rights that the citizens of either or both States, claimed as being derived from it.'

"Here it will be seen, the Supreme Court intimates no doubt of the validity of the compact, and, on the contrary, recognizes its validity, and holds that Congress, by virtue of the cession of the District of Columbia by Virginia and Maryland to the United States, had, within the limits of the district, the same right to modify the compact with the two States, but for the cession, might by their joint will have exercised.

"Again, in the case of 'Potomac Steamboat Co. vs. Upper Potomac Steamboat Co.,' 109 U. S. 672, where the question of the riparian rights of the United States as owner of Water street in the City of Washington, was examined and passed upon, the Supreme Court in ascertaining the rights of the United States in 1883, recognizes the validity of the compact, by quoting its 7th clause, which relates to riparian rights on the Potomac, and by referring to the decision in 12 Peters, (already cited.)

"And in a subsequent part of the opinion, the Court, after expressing a certain view in reference to riparian rights, goes on to say: 'This denies no right that can be claimed by virtue of the compact between Virginia and Maryland, of 1785, for that secured to their citizens the privilege of making and carrying out wharves as to the shores of the Potomac only, and so far as they were adjoining their land.'

"We thus find that this compact, in reference to certain of its provisions not superseded by the Constitution of the United States, since that instrument went into effect, has been recognized, enforced or construed by the highest Courts of this State and of Virginia, and by the Supreme Court of the United States, without the intimation of a doubt as to its validity.

"So in reference to the compact between New Jersey and Pennsylvania, as to fisheries in, and navigation of, and jurisdiction over, the Delaware river, made in 1783, without sanction of Congress.

"Mr. Justice Washington in 1823, in the case of Corfield vs. Corryal, 4 Washington C. Ct. Reports, 386, recognizes the compact and states what the Legislatures of the two States were, by its terms, authorized to do.

"And speaking of the same compact, Justice Baldwin, in the case of Bennett vs. Boggs, Baldwin's Report, 60, says: 'Connecting the proviso in the Compact of 1783, with the third section of the law of 1808, and the fourth section of that of 1822, we can have no doubt of the meaning of the Legislature in every part of the law. The compact authorizes the guarding of fisheries on the river annexed to the respective shores, against interruptions by persons fishing under claim of common right on the river; thus making a plain distinction between a fishery annexed to the shore and a fishing by common right on the river.' Here the opinion of the Court is distinctly founded on the compact as valid and operative.

"In the case of Randle vs. Delaware and Raritan Canal Co., 14 Howard S. Court, 80-94, the Supreme Court, speaking of this same Compact of 1783, after disposing of the case on other grounds, say: 'With these views it will be unnecessary to inquire whether the Compact of 1783, between Pennsylvania and New Jersey, operated as a revocation of the license or toleration, implied from the proviso of the Colonial Acts of 1771, as that question can arise only in case the plaintiff's dam be indicted as a public nuisance.' No intimation by the Court of any question as to the validity of the compact, but on the contrary, a reference to the question whether it '*operated* as a revocation, &c.,' as one unnecessary to be decided in the case.

"Again, in the case of Marlatt vs. Silk, 11 Peters, 1, a question of title to lands arising under a compact between Pennsylvania and Virginia, made in 1780, without the consent of Congress, so far as I have been able to ascertain, was presented to the Supreme Court of the United States. The compact adjusted and settled the disputed boundary between the two States, and also declared, 'That the private property and rights of all persons acquired under, founded on, or recognized by, the laws of either country, previous to the date hereof, shall be secured and confirmed to them, although they shall be found to fall within the other; and that in disputes thereon, preference shall be given to the elder or prior right, whichever of the said States the same shall have been acquired under.'

"The Court enforces this compact and decides in favor of the party which, in its opinion, had the elder or prior right; and when it was contended that the Court should be controlled by a decision of the highest Pennsylvania State Court, as if a question of State law merely was involved, the Court refused to take that view and said, 'In the case at bar, the question arises under, and is to be decided by a compact between two States, where, therefore, the rule of decision is not to be collected from the decisions of either State, but is one, if we may so speak, of an international character.'

"Here was a compact between two States made while the Articles of Confederation were in force, and carried into effect as valid and obligatory in 1837.

"This same Compact of 1780 was upheld and applied by the Supreme Court of Pennsylvania in the case of Brian vs. Elliott, 2 Penn. Rep., 49-61. Chief Justice Gibson, speaking there of the power of the two States to affect individual titles by their compact, says, 'There was no constitutional limitation on either side; and the parties acting in the capacity of sovereigns, were fettered by no rule, but their sense of expediency and justice.'

"In view of these decisions and of the legislation of the two States above referred to, I do not think any Court would now hold the Compact of 1785 to be invalid.

"But besides this, the special legislation of this State for the settlement of the boundary between Virginia and Maryland, by its terms binds the State in honor and in law to abide by the compact.

"By the Act of 1874, chap. 247, the settlement and determination of the true line of boundary between the two States was referred to Jeremiah S. Black and William A. Graham, and a third person to be selected by them, but with the following proviso: 'Provided, however, that neither of the States nor the citizens thereof shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them, entered into in the year seventeen hundred and eighty-five, *but that the same shall remain* to and *be enjoyed by the said States, and the citizens thereof forever*.'

"Then by the Act of 1876, ch. 198, James B. Beck was appointed arbitrator in the place of William A. Graham, deceased, and in this Act the above proviso is expressly repeated, with the further proviso, 'that the land-holders on either side of the line of boundary, * * * * as the same may be ascertained and determined by the said award, shall in no manner be disturbed thereby in their title to and possession of their lands, but shall in any case hold and possess the same as if their said titles and possession had been derived under the laws of the State, in which, by the fixing of said line by the terms of said award, they may be ascertained to be.'

"A similar Act of Assembly was passed by Virginia.

"It will thus be perceived that the agreement of the two States to refer the question of boundary to arbitrators, was expressly on the two conditions, that the rights and privileges set forth and enumerated in the Compact of 1785, 'shall remain to, and be enjoyed by the said States and the citizens thereof forever'; and that the titles and possession of land-holders, which might otherwise be affected or made questionable by the line of boundary awarded, should be preserved and protected.

"An award ascertaining the boundary was made by two of the arbitrators in 1877, and was accepted by both States.

"In the Act of Assembly of Maryland of 1878, ch. 274, by which the award was accepted, the preamble recites, that the faith of the State was pledged to abide by the award as final and conclusive, 'with the proviso and saving clauses as to private rights,' as in the Act of 1876, chap. 198, set forth.

"The two States having thus agreed to submit the question of boundary to arbitrators, and having accepted the award made by them, then proceeded to obtain the consent of Congress.

" This was given by an Act of Congress to be found in United States Statutes at large of 1878-79, ch. 196, page 483, entitled 'An Act giving the consent of Congress to an agreement or compact entered into between the States of Virginia and Maryland, respecting the boundary between the two States.'

" The Act recites that arbitrators duly appointed by the two States to ascertain and fix the boundary between them, had made an award; sets out the award in full, recites that it had been ratified and confirmed by the Legislature of each State, and then enacts 'that the consent of Congress is hereby given to the said agreement or award, and to each and every part and article thereof, &c.'

"It thus appears that by the very terms of the agreement, evidenced by the legislation of the two States, under which the boundary award was made, it was expressly stipulated and made a condition, not merely that the States should not be deprived of any of the rights and privileges enumerated in the Compact of 1785, but also that those rights and privileges 'should remain to and be enjoyed by the said States and the citizens thereof forever.'

"There could not be a more solemn and conclusive recognition and assertion of the continued existence and obligatory force of the compact, than is contained in this language. Upon this condition the award was made and accepted by the States, and the present boundary between them ascertained and established. It would be a glaring breach of good faith, for Maryland now to assert in a proceeding against the State of Virginia, that the compact was always a nullity, or had died in its infancy, by the operation of the Constitution of the United States, and that the two States and their citizens had no rights or privileges under it; and I think that the Supreme Court, with this breach of good faith, added to the considerations and authorities set forth above, would have no hesitation in dismissing such a proceeding.

"But further, does not the consent of Congress given by an Act passed for that purpose, (U. S. Statutes at large, 1878-79, ch. 196, page 481,) cover all the conditions and stipulations upon which the award was made, and make them an agreement or compact consented to by Congress, and therefore constitutionally obligatory?

"The Act of Congress is entitled 'An Act to give the consent of Congress to an *agreement* or *compact* between the States of Virginia and Maryland, &c.' Clearly the stipulations in reference to rights and privileges under the Compact of 1785, were a part of the agreement between the States.

"Then the Act recites that arbitrators duly appointed by the two States had made an award. The best evidence of this due appointment of arbitrators was the Acts of Assembly of the States appointing them, in which Acts the stipulations or proviso as to the Compact of 1785 were contained, and we can not well avoid assuming that these Acts, constituting as they did, the agreement and terms on which the award was made, were laid before Congress, that it might see what was the agreement, it was asked to sanction. The Act sets out the award and recites that it had been ratified and confirmed by the Legislatures of the States. These Acts of ratification, we have a right to assume, were laid before Congress; and the Maryland Act, 1878, ch. 274, recites in its preamble, that the faith of the State was pledged to accept the award as final and conclusive, 'with the proviso and saving clauses as to private rights,' set forth in the Act of 1876, appointing the arbitrators.

"The Act of Congress then gives the consent of Congress to the said agreement or award, as to each and every part or article thereof. This language is somewhat obscure. But Congress only had power to consent to an *agreement* or *compact* between the States, and it would seem to me that the real agreement or compact here was made up of the original Acts of Assembly appointing arbitrators and stipulating as to certain conditions of the award and of the Acts of Assembly accepting and ratifying the award, and that the consent of Congress was given to the agreement as a whole.

"The award has no force of itself, but was dependent on the agreement for its validity, and it would be unreasonable to suppose that Congress gave its consent to the award, but not to the terms, upon which alone the award could validly be made. It was the agreement between the States, to which the consent was to be given, and Congress must be presumed to have known the terms and conditions of the agreement which it sanctioned.

Could it be contended with any show of reason or justice that the condition contained in the Act of 1876, for the protection of the titles of land-owners after the ascertainment of the boundary line, is invalid, and affords no protection to such titles for want of Congressional consent? I think not, and the condition as to the rights and privileges secured by the Compact of 1785 stands on precisely the same ground.

"In the case of Green vs. Biddle, 8 Wheaton, 85-6-7, the question whether the agreement of 1789, between Virginia and Kentucky, that upon certain terms and conditions Kentucky should be created into an independent State, had sufficiently received the consent of Congress, was decided affirmatively by the Supreme Court. The Court there say, 'that the Constitution makes no provision respecting the mode or form, in which the consent of Congress is to be signified. The only question in cases which involve that point is, has Congress, by some positive act in relation to such agreement, signified the consent of that body to its validity.' Then, after referring to the legislative action of Virginia and the acceptance by Kentucky, the Court go on to say 'that Congress passed an Act, which after referring to the compact and its acceptance by Kentucky, declares the consent of that body to the creating of the said district into a separate and independent State upon a certain day, and receiving her into the Union.' This consent to the admission of Kentucky into the Union, as a State, was held by the Court to be a sufficient constitutional assent to the terms and conditions of the agreement, and the Court say: 'The terms and conditions, then, on which alone the separation (that is, the separation of Kentucky from Virginia) could take place, or the Act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the Act itself.'

"So in the Act of 1878-79, Congress referred to the appointment of arbitrators, which was made by mutual legislation of the two States, containing a certain proviso or stipulation as to rights under the Compact of 1785, and also referred to the ratification of the award, which was by Acts of Assembly of the States, in which the proviso was again mentioned, and then recited the award and gave its consent 'to the agreement or award'; and it would seem that here, as in the case before the Supreme Court, the terms and conditions upon which alone the award could be made, were 'necessarily assented to,' and that this results from the 'manifest construction of the Act itself.'

"What agreement or compact did Congress assent to, if not the agreement evidenced by the Acts of Assembly creating the arbitration and ratifying the award?

"Again, in the case of Virginia vs. West Virginia, 11 Wallace, 39, the question before the Supreme Court was, whether certain legislative agreements between Virginia and West Virginia in reference to Jefferson and other counties, had, by the Act of Congress admitting West Virginia as a State, been constitutionally consented to by Congress. The Court held that a sufficient consent had been given, and I quote the head note of the report. '4. The Act of Congress admitting the State of West Virginia into the Union, at the request of the Commonwealth of Virginia, with the provisions for the transfer of those counties in the constitution of the new State, and in the Acts of the Virginia Legislature, is an implied consent to the agreement of those States on that subject.'

"'5. The consent required by the Constitution to make valid agreements between the States need not necessarily be by an express assent to every proposition of the agreement. In the present case the assent is an irresistible inference from the legislation of Congress on the subject.'

"So in the case of Virginia and Maryland, the inference seems to be irresistible from the Act, that in consenting to the award, Congress consented to the terms and conditions of the agreement under which alone it could be validly made.

"If I am right in these views as to the Act of Congress, we have now a special compact between Virginia and Maryland, that the rights and privileges enumerated in the compact, shall remain to and be enjoyed by the States and their citizens forever, and this compact is sanctioned by Congress, and is binding and obligatory. This is not merely a recognition, but a substantial renewal and continuance of the compact.

"In view of the aforegoing considerations, authorities and legislation, I am of opinion that the State of Maryland cannot now rightfully or successfully allege that the compact is invalid.

"Assuming, now, that the stipulations of the compact are in force, except in so far as superseded by the operation of the Constitution of the United States, I understand the questions upon which an opinion is desired, are those which arise under the compact, as to the right of oyster fishery by the States and their respective citizens, in the waters of the Potomac river, and of the Pocomoke sound and river.

"The 7th clause of the compact, after making provision for the protection of the riparian rights of the citizens of each State, on the shores of the Potomac river, goes on to provide as follows, '*but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both States;* provided, that such common right be not exercised by the citizens of the one State to the hindrance or disturbance of the fisheries on the shores of the other State, and that the citizens of neither State shall have a right to fish with nets or seines on the shores of the other.' The compact made between the two States to preserve their friendship and to promote their mutual prosperity should receive not a technical, but a fair and reasonable construction. Keeping this rule in view, it would seem to be clear from the language of the compact underlined above, that it was intended to place the two States and their citizens upon a footing of entire and perfect equality as to the right of fishing in the river. To hold that one of the contracting States and its citizens were excluded from taking shell fish, while the other State and its citizens could take them, would destroy equality between them. The *common* right of fishing given to each State and its citizens, would then be not a common right of fishing in the river, but a special right to catch floating fish.

"To construe the compact correctly we must go back to the time when it was made. Then the boundary between the two

States was unsettled and in dispute, and the claims of the State were widely divergent. Therefore, the compact as to this right of fishery was not, by its terms, a grant of right by Maryland to Virginia, or by Virginia to Maryland, but an agreement by which common and equal rights of fishery were given and secured as well to Maryland as to Virginia. Could Maryland, at that time, while the territorial limits and jurisdiction of the two States were unsettled, and controverted, have reasonably claimed in the face of this language of the compact that she had a wider and more comprehensive right of fishing in the river than Virginia had?

"And if she could not then have fairly and properly made such claim, she cannot make it now, although her boundary is now settled, and the bed of the Potomac is now decided to be within her territory.

"I see no sufficient reason why the general right of fishing in the river, given to both States in common, and to be equally enjoyed, should not give to both of them the right to catch shell fish or stationary fish, as well as floating fish. The words are general enough to include them, and the apparent intention of the compact to put the people of the two States on the same footing in reference to riparian rights and the use of the waters of the Potomac seems to require that the language of the compact should receive such a construction. It has been said, that as oysters were not in 1785, the important article of commerce which they have since become, they were probably not in the contemplation of the framers of the compact. This is merely conjecture, and as oysters were then a well known and highly valued article of food, I do not think the suggestion is of sufficient force to limit the language of the 7th clause, or to shake the construction that it covered and applied to all kinds of fish, whether shell fish, or floating or stationary fish, as they then existed or might afterwards exist in the waters of the Potomac; nor do I think this construction is at all inconsistent with the proviso of the 7th clause, by which the shore fisheries, both on the Maryland and Virginia shores, are protected from disturbance.

"Substantially the compact gave to the citizens of the two States a common right of fishery in the Potomac; and it is well settled that a common right of fishery in any waters includes the right of oyster fishery. *Angell on Tide Waters, section 65; Gould's Law of Waters, section 20, note and authorities there cited.*

"In the case of Commonwealth vs. Bailey, 13 Allen, 542, the highest Court of Massachusetts say: 'It is now well settled that the public right of fishing, throughout Massachusetts, as in other parts of the United States and in Great Britain, includes shell fish, as well as floating or swimming fish.'

"In Moulton vs. Libbey, 37 Maine, 472, where the right to catch clams was involved, the Court say: 'In all treatises respecting that common right, the general term 'piscaria,' or its equivalent, is used as including all fisheries, without regard to their distinctive character, or to the method of taking the fish.' And in Caswell vs. Johnson, 58 Maine, 164, the same Court hold that a bond not to sell fish at a given place, was broken by selling oysters.

"In Smith vs. State of Maryland, 18 Howard, 74-75, the Supreme Court of the United States speak of 'the common liberty of taking fish, as well shell fish as floating fish.'

"I may add that by the Act of 1880, chapter 36, already referred to, which was an Act to regulate the taking of oysters in the Potomac, the assent of Virginia was expressly made necessary to the validity of the Act, thus seeming to recognize the construction, that the right of fishing provided for in the compact, was general, and included the right of oyster fishing.

"That fishing for oysters is included under the general term, right of fishing or fishery, is also illustrated by our own State legislation establishing what is called a 'State Fishery Force,' whose principal, if not only duty, is to enforce the laws in reference to oyster fisheries. (See Revised Code, Article 13, Oysters.)

"Upon the whole, I am of opinion that by a fair and reasonable construction of the 7th clause of the compact, the right of fishing, thus provided for, includes the right of fishing for oysters."

II, III AND IV.

As to the right of citizens of Maryland to fish and catch oysters in Pocomoke river and sound in common with citizens of Virginia.

In Hendricks vs. The Commonwealth, 75 Virginia, 939–940, Judge Anderson delivering the opinion of the Court, uses the following language:

> "By Article 8th, all laws and regulations which may be necessary for the preservation of fish in the river Potomac *or the river Pocomoke within the limits of Virginia*, shall be made with the mutual consent and approbation of both States. The effect of this Article is to give to the State of Virginia concurrent jurisdiction with the State of Maryland over the Potomac from shore to shore, *and over that part of the Pocomoke river which is within the limits of Virginia, to enact such laws with the consent and approval of Maryland*, as may be deemed necessary and proper for the preservation of fish in said waters."

On the other hand, Mr. Steele, in the opinion already cited, in speaking of this question, expresses himself as follows:

> "The next question is, whether the citizens of Maryland have the right of fishing (including, of course, the right of fishing for oysters,) in those parts of the Pocomoke sound and Pocomoke river which lie within the territorial limits of Virginia. If the Compact of 1785 is invalid and not in force, it would necessarily follow that the people of Maryland have no such right south of the line of boundary established by the award of 1877. Even if it could be shown that for many years back citizens of Maryland, equally with citizens of Virginia, had fished in those waters, I do not think that fact, occurring while the line of boundary was in doubt and unsettled, could take away the exclusive right of the State of Virginia to control the fisheries in those waters which lie within her territory, as now validly and finally settled by the award.

"The soil under those waters now belongs to her, and the exclusive right of fishery in them equally belong to her, unless by force of the Compact of 1785, or the proviso of the Acts of Assembly of 1874 and 1876, appointing arbitrators to determine the true line of boundary, she has agreed that the right should be equally enjoyed by the citizens of Maryland.

"Looking then to the terms of the compact, I find that the Pocomoke *sound* is nowhere mentioned in it; and that it contains no stipulation such as that in the case of the Potomac river, that the citizens of both States shall have the right of fishing in the Pocomoke river, and there being no such stipulation, there is no such right.

"The 8th clause of the compact is as follows: 'All laws and regulations which may be necessary for the preservation of fish or for the performance of quarantine, in the river Potomack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States.'

"The ordinary and grammatical construction of this sentence would manifestly limit the mutual or joint legislation over the river Pocomoke to 'the preserving and keeping open the channel and navigation,' and would not extend it to the 'preservation of fish' in that river.

"If this construction be correct, and in my judgment it is, there is nothing at all in the compact on the subject of fish in the Pocomoke, and consequently nothing upon which any claim of Marylanders to fish there could be founded. The compact having, by its previous clauses, given to Marylanders no right to fish in that part of the Pocomoke river belonging to Virginia, there seems to be no reason why it should give to Maryland, the power to legislate for the preservation of fish in that part of the river.

"But, in the case of Hendricks vs. Commonwealth, 75 Virginia Rep., 939–940, the Court of Appeals of Virginia say that, 'By Article 8, all laws and regulations which may be necessary for the preservation of fish in the river Potomac or the river

Pocomoke, within the limits of Virginia, shall be made with the mutual consent and approbation of both States. The effect of this article is to give to the State of Virginia concurrent jurisdiction with the State of Maryland over the Potomac from shore to shore, and over that part of the Pocomoke river which is within the limits of Virginia, to enact such laws with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters.'

"The question in this case was in reference to the jurisdiction of the Virginia Courts. Hendricks was indicted for the violation of a law, passed by the mutual consent of both States, for the regulation of fishing in the Potomac river, and it being alleged that Hendricks was a citizen of Maryland, the question was presented, whether the Courts of Virginia could try him, or whether under the compact he could only be tried by a Court of Maryland. There was no question in the case concerning the Pocomoke river, but the Court in examining the question of the jurisdiction of the two States over the offence charged to have been committed on the Potomac, refer to the 8th section of the compact, and without quoting it, use the language above cited, as descriptive of its provisions. I think it may well be doubted whether the Court of Appeals of Virginia would consider what is there said about the Pocomoke river, as a binding decision of that learned tribunal.

"If we assume this liberal construction of the 8th clause to be established by this case, then the right of the State of Maryland to participate in the legislation for preserving fish in that part of the Pocomoke river within the State of Virginia, would furnish some ground for an inference, that the compact meant that citizens of Maryland should have the right to participate in the fishing in that part of the river. But such an inference is met and I think overcome by the fact that although the subject of the right of fishery was a matter to which the attention of the framers of the compact was directed, yet no stipulation as to a joint right of fishing in the Pocomoke was inserted. If they meant to secure such a right to the two States, they would have inserted a provision to that effect, as in the case of the Potomac river.

"In connection with this subject it has been suggested, that the words 'Pocomoke river,' as used in the compact, should be construed to include what is now known as Pocomoke sound. This question is unimportant if I am correct in my opinion that no right to fish in the Pocomoke river within the limits of Virginia is given to Marylanders by the compact, but, as it has been suggested, it seems proper that I should briefly refer to it.

"The compact speaks only of the waters of the Potomac river, the Chesapeake bay and the river Pocomoke. It is true, as far as I can learn, that the name of Pocomoke sound had not in 1785, been affixed to the waters now embraced by it; but that does not solve the question whether those waters were considered a part of Chesapeake bay or a part of Pocomoke river. The fact that they have received and now bear the name of Pocomoke sound, would seem to establish, that they are not in fact, and geographically a part of the river, and were not in 1785; and if that be so, we ought not, without very clear proof, to assume, that the framers of the compact and the legislatures of the two States, meant to include under the words 'Pocomoke river' any waters which were not in fact a part of that river.

"I have examined such old maps of Maryland as were within my reach, and I find that in a map by Augustin Herrman, dated 1670, these waters are laid down as 'Pocomoke bay,' and that the same name is given to them, in a map by Dennis Griffith in 1795, only ten years after the compact, while in other old maps they seem to be left as an unnamed part of Chesapeake bay.

"These maps tend to show that these waters were regarded as parts of Chesapeake bay (named or unnamed) rather than as parts of Pocomoke river.

"Without, however, undertaking to express a positive opinion on this historical and geographical question, I can only say that if the broad bay or sheet of water which connects the Pocomoke river with the Chesapeake bay, is not physically and geographically a part of the river, I have in my examination of the question, found nothing in my judgment sufficient to justify the construction, that in the compact 'Pocomoke river' includes what is known as Pocomoke sound.

"While it would be only fair and just that Virginia having the right of fishery in the Potomac, which belongs to Maryland, should as an equivalent, concede to Maryland the right of fishery in that part of the Pocomoke sound which belongs to Virginia, I am of opinion that the compact does not give to the citizens of Maryland any right to fish in Pocomoke river or Pocomoke sound; and that it would be much better for Maryland to accept the report of the Joint Commission of the two States, of February 14th, 1882, or negotiate some similar agreement, than to embark in litigation with the State of Virginia."

I. NEVETT STEELE.

Baltimore, Dec. 9th, 1885.

These two conflicting opinions may fairly be said to leave the question open for further discussion and final decision; and if the counsel of Virginia decline to be bound by the decision of the whole Court of Appeals of their State, and prefer to accept and rely on the unofficial and individual opinion of one of Maryland's great lawyers, to the contrary, surely the counsel of Maryland may with equal force insist that the decision of the Court of Appeals of Virginia declares the correct view of the subject. The interpretation of the Virginia Court of the intent and effect of the 7th and 8th sections of the compact, corresponding as it does with the contemporaneous or nearly contemporaneous understanding by the people of the two States, of their meaning, and embodying in a few words the outcome and result of repeated Virginia legislation as to the common right of fishery of Virginians and Marylanders in these waters, ought to prevail.

In fact, it implies no disrespect to Mr. Steele to say that in his natural and commendable desire not to urge the rights of Maryland unduly, he fell into the opposite error of omitting to give proper weight to the universal understanding of the people of the two States from the beginning—to the unbroken recognition of their respective rights until within the last few years—and to a legislative concession by Virginia of the right now claimed by Maryland in a series of statutes beginning as early as 1819. The language of some of these statutes can not be comprehended otherwise than as an admission of the right now claimed by Maryland.

But treating the question as substantially *res nova*, how stands the case?

The demurrer confesses the truth of the allegations of defendant's plea.

The compact being operative and unrepealed, the facts stated in the plea are true, and being so, the oyster law of Virginia, under which this indictment was found and conviction had, is utterly void as to citizens of Maryland taking oysters in Pocomoke river, wherever the body of water, so designated in the compact, may be.

The location of Watkins Point has been a source of contention and disagreement since the granting of his charter to Lord Baltimore. It finally came to be understood that the boundary was about the latitude of Onancock, and was so fixed by a very early proclamation of the Governor of Virginia. This was upon the supposition that "Little Watts Island," which is quite a promontory, was Watkins Point. One Colonel Edmund Scarborough, of Virginia, magistrate of the eastern shore of Virginia, would not have it so, and invaded Maryland with a troop of forty horse, compelling the inhabitants, most of whom had been refugees from Virginia on account of the enforcement of the religious conformity Acts in that State, and had been settled in Maryland by Scarborough and Randall Revell, on order of commission of Lord Baltimore for that purpose authorizing them to grant lands to settlers in his name, to take an oath of allegiance to the Governor of Virginia. The dispute being thus re-opened was again apparently settled by a new commission to locate Watkins

Point. They agreed that the point of land in Maryland running down to Cedar Straits was Watkins Point.

Prior to this time neither State seems to have patented the lands thus necessarily in dispute, but immediately after the transaction of the Calvert-Scarborough line in 1668, both States proceeded to issue patents for the land. Virginia patented Watts and Fox Islands, and Maryland the peninsula between Annamessex and Pocomoke rivers or bay, down to Cedar Strait. The water touching the west side of Fox Island is called by various names, in contemporaneous documents of that date. In some it is called Nanticoke Sound, in some Tangiers or Tanger Sound, and in others it is called Chesapeake Bay. The name Nanticoke Sound is given to designate it as the mouth or outlet of the Nanticoke, which is the principal river emptying into it. The water on the east side is designated as Pocomoke River, Bay and Sound, almost indiscriminately.

The compact of 1785 was arranged immediately after the Revolution, and was a commercial necessity, at that time, to both States, in their new and changed condition.

The first section disclaims all right on the part of Virginia to impose any toll, duty or charge, prohibition or restraint, on any vessel whatever, (foreign or domestic,) sailing from the ocean through the capes of Chesapeake bay to the State of Maryland, which could only be done in three ways, i. e., (1) by sailing up said Chesapeake bay in Virginia to Chesapeake bay in Maryland, or (2) Potomac river, Maryland, or (3) Pocomoke river in Virginia to Pocomoke river in Maryland; and also, it makes the same provision as to vessels "from the said State" (of Maryland) by said Pocomoke river in Maryland and Virginia; or Chesapeake bay in Maryland; or Potomac river in Maryland to Chesapeake bay in Virginia, and "through said capes outward bound." And it further agrees that the waters of Chesapeake bay and the river Pocomoke, within the limits of Virginia, (which lead from the great ocean to the Pocomoke river in Maryland, on the east side,) be forever considered as a common highway—free for the use and navigation of any vessels belonging to the said State of Maryland or any citizens, &c., of Chesapeake bay and Pocomoke river, and be free for the navigation of vessels from one part of the State of Maryland to another. Of what value to Maryland, it may well be asked, would have been a highway at that time from the ocean through the capes to the Pocomoke river in Virginia, and thence to the said river in Maryland, had there still remained a body of water twelve or fifteen miles long and six or eight wide, called Pocomoke sound, which was unprovided for in the compact?

It is evident that in the meaning of the commission, vessels of Maryland passed from the ocean into Chesapeake bay in Virginia, thence into Pocomoke river in Virginia, and thence into Pocomoke river in Maryland.

The *second* section provides certain privileges for vessels of Virginia in waters of Maryland. The *third* relates to vessels of war of either State. The *fifth* and *sixth* relate to the navigation of the Potomac.

The *seventh* was made necessary to be provided in the Potomac river, owing to the fact that the line of boundary was on the south shore of the Potomac, at low water mark, and except by the provision of the 7th section of the compact. Virginia, although living on and owning the shores of the river, would have had no riparian rights or fishing rights in the river.

The situation in the Pocomoke river in this respect was entirely different, and required no such provision in reference to that stream.

The line then ran in the middle of the river, and each side was entitled to its own riparian rights and fishing rights, at least, to their respective lines without any new stipulation to that effect. That line was located by the Black and Jenkins decision as in Pocomoke sound.

The tenth section of the compact provides for all kinds of offenses, public and private. As to piracy, murder, rape, larceny and such crimes, there is a general agreement as to their heinous character, and the nature and severity of their punishment, among all civilized nations. So as to offenses against individuals, the principles on which questions, as to the ownership of vessels, trespass on lands, &c., are decided, are the same everywhere, and hence the place of trial would make but little difference, except that under the compact, the party tried would have the advantage of a jury of the vicinage.

As to mere police regulations, such as are "laws and regulations for the preservation of fish," there can be no general agreement or concurrence of opinion among independent States, situated in different circumstances, either as to what these regulations should be or what punishment should be meted out to offenders against them.

These offences are *mala prohibita*, not *mala in se*. No moral sense is shocked by any breach of them—the acts are only wrong because the law forbids the doing of them. In this respect they differ from all other classes of offences provided for in the tenth section.

The Mount Vernon Commissioners understood the necessity for UNIFORMITY in these regulations and in the punishment for infractions of them. They therefore provided for it in the 8TH SECTION of the compact, which provides that "all laws for the preservation of fish or for the performance of quarantine, in the River Potomac, or for preserving or keeping open the channel and navigation thereof, or of the River Pocomoke, within the limits of Virginia, by preventing the throwing out of ballast or of giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States."

The *letter* of this section can be construed in two ways. One construction excludes the Pocomoke river wholly from that portion of the 8th section which refers to "laws for the preservation of fish." This is the construction now put upon it by the law officers of Virginia in this suit.

This view is of recent origin and was unknown in the earlier history of the States under the Constitution of the United States.

The second view of the proper construction of the letter of the 8th section is that there is a *complete* mutuality as to both rivers, and the rights to be enjoyed in them by the people of the two States. Both these are grammatical constructions, and the latter has the greater weight both in years and in authority, and makes the letter and the spirit of the compact to agree.

The LEGISLATURE of Virginia by an unbroken series of Acts, beginning with its first oyster law and extending down to 1880, has practically put upon the 8th section, the latter interpretation, and has conceded to Marylanders in both rivers, the same oyster rights as Virginians. The laws will be referred to, particularly, hereafter.

The COURT OF APPEALS of Virginia in Hendricks vs. State, 75 Va. 941, in discussing an indictment founded, expressly and confessedly, upon the 8th section, says: "The effect of this section (the 8th of the compact) is to give to the State of Virginia, concurrent jurisdiction with the State of Maryland over the Potomac river from shore to shore, and over that part of Pocomoke river, which is within the limits of Virginia, to enact such laws, with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters."

If the 8th section is to be interpreted according to its *spirit* and not its mere letter, there is but one construction possible to be placed upon it. Maryland was giving up certain rights "in the river Potomac" within the limits of Maryland, and receiving in return, "mutual" and similar concessions in "the river Pocomoke within the limits of Virginia."

It seems to be now universally conceded that the term "fish" includes oysters.

Gould's Laws of Waters, sec. 20, and note.

Marylanders, from time immemorial, enjoyed the right of oystering in Pocomoke sound, without molestation, until shortly before the line was determined by the arbitrators in 1877, and located by commissioners appointed by the two States in 1883.

Interpreted then either by the letter or by the spirit of the compact, there is an entire mutuality or equality of privileges in both rivers, for both States. And all the departments of the Government of Virginia have acted in conformity with this view since the making of the compact in 1785.

It has been suggested that the Acts of Assembly supposed to sustain the above construction of the compact were not concessions of the Maryland right, but only a temporary suspension of the exclusive right of Virginia pending the controversy as to the line.

This can not be true. There never has been any real controversy between the two States as to the line, ON LAND, on the Eastern Shore of Maryland and Virginia. Nobody ever cared about this LAND and no controversy could have been aroused with reference to that. There was unfortunately a controversy as to the territory between the north and south branches of the Potomac, in what is now West Virginia. But for this, no controversy, on the Eastern Shore, would have ever been heard of.

The compact and the legislative action of Virginia, and the peaceable enjoyment of their equal rights to fish in Pocomoke by citizens of Maryland, was for more than half a century a complete and satisfactory settlement of the whole controversy on the lower Potomac and in Pocomoke sound. The disputed location of the line, as to the upper branches of the Potomac, alone, kept the controversy open.

The first agitation as to the line in Tangier sound arose from an attempt to enforce against Marylanders the oyster laws of Maryland, in Tangier sound. Ingenious counsel for defence threw doubt upon the line in Tangier sound, and Maryland, in 1852, proposed to Virginia the appointment of Commissioners to locate the boundary line from the head waters of the Potomac to the ocean. Virginia took no interest in the question and made no response whatever until 1858, when the governor was Henry A. Wise, who was born and lived for many years on the eastern shore of Virginia. Under his aggressive lead, the State appointed commissioners to act with those from Maryland, and there was a survey made in 1860 by John De La Camp—the object of which, on the part of Governor Wise, was to obtain for Virginia the exclusive title to and possession of Pocomoke sound and the greater part of Tangier sound also for their oyster wealth. Crisfield had not then been located and the Eastern Shore Railroad existed only on paper. The land both on Smith's island and the main land was low and marshy and of small value—not calculated to excite the cupidity of anyone. The oyster trade had, however, developed so as to be of great value and none knew its value and importance, in that section, better than Governor Wise.

Governor Wise's intense interest in the subject will be appreciated, when it is understood that he caused to be "CORRECTED," in 1859, the map, on a large scale, in the Virginia State Library at Richmond, constructed by Herman Boye, in 1825, by striking out the name "Watkins point" from the point of land, running down to Cedar straits and placing it at Janes' island, *north* of the Little Annamessex river instead of *south*. Boye certifies that his map was constructed in conformity to law, from the surveys authorized by the Legislature and other original and authentic documents. This map, after being "corrected" under such remarkable circumstances was the only one that then existed which so places Watkins point. And the motive for the correction is not to be found on land, but under water. It is marked "corrected by order of the

Executive, 1859." A new edition of this "corrected" map was published in 1860.

So that the truth is the acts conceding the rights of Marylanders to oyster in Pocomoke were passed because, by that concession in the compact, as understood by both States, and the actual enjoyment of that right by Marylanders, all controversy as to the line between the two States had been put to rest except as to territory lying between the north and south branches of the Potomac.

The renewal of controversy was not in reference to the old controversy as to the line on the land, but grew out of the oyster privileges on the water. The controversy carried on by Scarborough, when, with a troop of forty horsemen "for pomp of safety" he invaded Annamessex and Manokin never did revive, but died forever in 1785, at Mount Vernon; it had no existence, gave no sign of life from that time to 1858.

Governor Wise, the author of the statement of the Virginia case, and which may be found in "Document E," "Senate Documents" of the Maryland Legislature, session 1874, page 308, confirms this statement in these words: "Such was the feeling of amity between the best of neighbors. And these people could not then tell what State they were citizens of, but those at Cedar straits were most convenient in Maryland. The fisheries and fowling were superabundant, and until about forty years ago they 'lived and let live' in the most friendly neighborhood, and for exchange of fisheries as well as comities of every kind. We repeat that it was not until oyster catching and planting and packing became so profitable and worth so much that any '*sacra fames auri*' ever disturbed that old time state of kindness between these people." This was written about 1873 or 1874, and it supports the view that Maryland was not seeking any aggressive advance into Virginia territory, nor had been, but finding no clear line across the bay, no specific point conceded as Watkins point to which the line from Smith's point could be run, merely asks Virginia to DEFINE the line in order to enforce her own oyster laws among her own citizens. Maryland did not seek to grasp any new territory, but only sought an agreement as to where the line was. Governor Wise seized upon the necessity of such a definition to contend that the north bank of the Potomac was the dividing line, and that the line of division, on the eastern shore, passed through Janes' Island and the town of Crisfield. It was the newly developed value of the oyster beds alone that prompted Governor Wise to reach out for Tangier and Pocomoke sounds and induced the Virginia Legislature afterward to withdraw its concessions to Marylanders in Pocomoke sound.

But we are told that it is conceded that Maryland has equal right with Virginia to oyster in Pocomoke river, but that the SOUND IS NOT THE RIVER.

It must be remembered that it is not incumbent on the Maryland side to show that Pocomoke river and Pocomoke sound are really one body of water, though we think and contend they are; but only to show that the body of water now known as Pocomoke sound, was known as the Pocomoke river at the time of the making of the compact and the Calvert-Scarborough line which the compact superseded, as well as the river Wighco, so called, in the charter of Maryland. The charter speaks of "Watkins point beside the bay aforesaid (Chesapeake) situated near the river of Wighco, on the west" (of said river.)

Here now is Watkins point, having Chesapeake Bay, (now called Tangier Sound,) on the West and Wighco river on the east.

In 1668 Phillip Calvert and Edmund Scarborough agreed upon a line, in accordance with which, land titles were afterwards granted in both States. It was first necessary to determine Watkins point, which they did as follows: "after a full and perfect view taken of the point of land made by the north side of Pocomoke Bay have and do conclude the same to be Watkins point we have run an east line, &c."

Here we have Watkins Point more fully defined. Chesapeake Bay or Tangier Sound on the west, the River Wighco or Pocomoke Bay on the east and south, and Annamessex Bay on the north of said point.

Now was the Wighco river the same body as the Pocomoke Bay?

Edmund Scarborough laid out the Calvert-Scarborough line, and he ought to be supposed to know what body of water it was that lay east and south of Watkins point. He has left us his affidavit and that of many others which he caused to be taken on that subject, being the depositions of Edmund Scarborough, William Jones and others, in the County Court of Accomac County, and is in reference to this very body of water.

"Captain William Jones, Justice of the Peace, and quorum of his Majesty's Court, County of Northton, Virginia, doth declare on oath yt: "about thirty-five or thirty-six years since, he did often sale a trading with ye Indians in ye bay of Chessepiack, and well knew ye river Pocomoke, which lyeth to ye southward of a little point described in Captain Smith's mapp without a name, and is so far southward as a man can see from ye place described in Captain Smith's Mapp for Watkins Point, and doth affirm yt ye said river of Pokomoke was then so called, and no such name as the river Wichco, either at yt time or in the memory of man before was ever applied to ye river Pokomoke, and yt ever since ye said river soe scituated as aforesaid, hath been and is called by ye name of Pokomoke river."

"The severall persons subscribed doe make oath yt they have of long time heard of and known ye river of Pokomoke, and yt ye said river has been so called time out of mind, both by ye report of ye Indians and knowledge of ye subscribers, and is to this day so called, being a river on ye Eastern Shore of Chessepiack Bay in Virginia, lying to ye southward of a small spiral point on the south side of Annamessex, and yt point is to the south of the place described in Captain Smith's mapp for Watkins point, so far as a man can see in a clear day, and yt said river of Pokomoke and so scituate as aforesaid is so called to this day."

EDMUND SCARBOROUGH,
WILLIAM JONES,
GEORGE PARKER,
ANTO. HUDGKINS,
JNO. RENNY,
JNO. WISE,
EDWARD REVELL,
CHARLES SCARBOROUGH.

Governor Wise in his statement of the Virginia case explains on page 292, the above affidavits correctly.

"Watkins point was laid down and named by Smith. There it is now, in the shape of headland and coast remarkably the same, and the headland of little Annamessex is there, the western most angle, and there still is the point of main marsh land at Cedar straits, and there are the Fox islands so strikingly described by the County Court of Accomac County in 1663 as "spiral point"—so called because of broken thoroughfares of the Fox islands at its end. Those islands were there, then as now, as Smith's map shows."

In other words, standing at Cedar straits one can see on a clear day to Watts island, and the mouth of the Pocomoke RIVER, (not SOUND,) in 1663 was reported to lie to the south of that island, the last and lowest one in "the spiral point."

Nothing can be clearer or more specific. The Pocomoke river extended to Watts island, and Chesapeake bay extended only to Watkins point and Watts island, at which latter place was its junction with the Pocomoke river.

tion as when it was entered into, will be entitled to great weight and consideration (96 U. S. 168), and in construing such contracts the words must be taken as the parties understood them, and not, necessarily, in their grammatical or etymological signification.

The oyster laws of Virginia, from the earliest law to the days of Henry A. Wise, are a legislative concession and declaration both, that "fish" include "oysters," and that the eighth section of the compact included Pocomoke sound or river. In 1819, the first public oyster law was passed by Virginia, (the first at least of which we have any record.) (The one of 1812 only prohibited the burning of them into lime.) It prohibited any person who was not a citizen or resident of the State, from taking oysters in any of the waters thereof, except in the waters of the Potomac and Pocomoke rivers, where these rivers are common between the States of Maryland and Virginia. In 1831, an Act was passed which prohibited all, except actual inhabitants and residents of Virginia, from taking oysters in the waters of Virginia, except in such rivers and such portions thereof, as are common property to this and some other State; and thus down to 1867, when the first hostile statute was passed by Virginia, which forbade Marylanders from oystering in either the Potomac or Pocomoke rivers. From that time on to the present, numerous Acts of aggression and oppression have been perpetrated against citizens of Maryland, which have had a tendency to greatly mar that spirit of amity about which Governor Wise so feelingly talks, ending in the killing of one man, the shooting of several others, and the capture and confiscation of numberless canoes and other vessels. The peace made by General Washington was only broken when war was declared by General Wise.

The compact of 1785 ignored all questions of dispute, and conflicting interests, and virtually divided the disputed territory, with its privileges and advantages, between the two States to be enjoyed by them, equally and jointly. It was intended among other things to give Maryland vessels a free and unobstructed passage from all points on Chesapeake Bay in Maryland, and on Pocomoke river, through those parts of Pocomoke river and Chesapeake Bay lying in Virginia to the ocean. It gave Virginia in return a right to send all her vessels, free of duty into all parts of Chesapeake Bay in Maryland, and into all the rivers and harbors of Maryland; it follows, therefore, that unless we set down the Virginia Commissioners as tricksters and those of Maryland as fools, the arrangement made as to vessels of Maryland passing through Pocomoke river to the ocean included Pocomoke sound; which was therefore either Pocomoke river or Chesapeake Bay. We have shown, from the charter, that Chesapeake Bay went no farther on the eastern side than Watkins point, and from the same charter, from the Calvert-Scarborough agreement in 1668, and by the Accomac affidavits in 1663, that the mouth of Pocomoke (miscalled Wighco) river was at Watts island.

What rivers were they which were "common territory between the States of Maryland and Virginia?" Obviously, if the line ran directly ACROSS the river as Virginia contends it did across the Pocomoke, there would be no territory *in common* on that river. The territory of each would be sharply separated from that of the other. In order to answer this question, we must consider not only the facts above given, but also the state of geographical knowledge existing at the time and the maps then in existence (1785,) as far as now known.

Capt. Smith's map published first in 1612, and again in 1629, calls the river "Wighco Flu," which Will Jones and Edmund Scarborough called "Pocomoke;" the little spiral point is there, and Russell's islands are also there, being what we now designate as Tangier islands, and which Capt. Smith states was the next point reached by him, going northward, from the mouth of the river Wighco. From this map it is impossible to conceive the Wighco or any part of it, lying east of Watkins Point, as being part of Chesapeake bay or any thing other than what he called it, a river. Lord Baltimore's map followed Smith's in 1634, then Herman's map in 1670. In the two latter maps the line through Pocomoke, between the two States crosses what is now known as Pocomoke sound, and divides the river lengthwise, so that it is common to the two States for a large part of its length up to Holston's. All other maps in existence up to 1785 laid down the bay or river, and the line, substantially as did Lord Baltimore's and Herman's.

In 1787, Thomas Jefferson published his notes on Virginia, and the accompanying map made after Fry and Jefferson's older map of Virginia. It follows closely, even exactly in these particulars, the line and the description of the river as laid down by Herman and Lord Baltimore, and makes no intimation that there was a separate body of water known as the sound, to distinguish it from the river. Thomas Jefferson was deeply interested in the result of the conference at Mt. Vernon, in 1785, as his correspondence with Madison on the subject abundantly shows, and was fully conversant with their action. His map shows his opinion and knowledge as well as of that of Peter Jefferson, his father, as to what they did, and that he believed the body of water, extending from Watts island to Williams point, was a part of Pocomoke river and not a distinct and separate body therefrom.

To the keeping of this compact, the faith and honor of each State was pledged.

It will be remembered, that by the decision of Black and Jenkins, Watkins point is definitely located, and the true line runs thence east to the ocean. Many thousand acres of valuable land on the eastern shore of Virginia, above and below the line, had already, in 1668, passed into the hands of citizens of Virginia, under patents issued in Virginia, which, by the award in 1877, are shown to justly belong to Maryland. The Calvert and Scarborough agreement included these lands and provided (see Maryland Council Book, 1669 to 1673) that all citizens of Virginia who had taken out patents in Virginia for lands, now found to be in Maryland, should retain them. They did retain and do so to this day, the several thousands of acres, justly belonging to Maryland, should a true east line be run from Watkins point to the ocean. There is no way for us to be released from this relinquishment. We have abided by it, in good faith, and given up what is justly ours, ON THE LAND. What we obtained in return for this was certain concessions in WATERS, the most part of which, by far, is justly ours, by virtue of the King's charter to Lord Baltimore, (if the true line of the charter as found by the arbitrators prevailed, and of which we were deprived by the aggressiveness and unscrupulousness of Col. Scarborough.)

Various efforts have been made since 1870 to settle the questions involved in this cause by negotiation between the States. Maryland has at all times been willing to make concessions, but has never received an offer of any concessions on the part of Virginia, except in 1882, when by an Act of the General Assembly of Virginia an offer was made giving to Maryland joint and equal rights, as provided by the compact, in a large portion of Pocomoke Sound. This offer was, however, coupled with such conditions that it was rejected by Maryland, and the Virginia Act being made dependent for its validity on the passage of a similar Act by Maryland, did not go into force. No concurrent legislation was therefore ever passed by the two States relating to the preservation of fish in these waters.

Both States have had jurisdiction in Pocomoke sound under their own laws, of various offences, and Maryland, as well as Virginia, has exercised such jurisdiction there, but she has rightly abstained from attempting to enforce either the Virginia and Maryland oyster laws in that part of Pocomoke river or sound which lies in Virginia.

Of late years Virginia has passed an oyster planting law, under which, last year, 1893, Captain Baylor laid down the natural oyster beds of Virginia in Pocomoke sound, and opened up certain other grounds to oyster planting. The system is so new, however, that no oysters have been planted under it in any of the disputed waters, and in none of the arrests made of Marylanders there, have there been any charges or even suspicions that oysters have been taken by Marylanders on private grounds belonging to Virginians.

The only joint law ever enacted as to the Potomac is the Act of 1884, which is still in force in both States. A law regulating concurrently as to Pocomoke was passed by Virginia, as stated heretofore, in 1882.

The award of Black and Jenkins did not attempt to abrogate the compact. On the contrary, both States expressly by statute withheld from them any power to do so by any decision they might reach.

This award, however, fixes Watkins Point as being in latitude 37 degrees, 54 minutes and 38 seconds, longitude 75 degrees, 52 minutes, 44 seconds—a line due east from this point passed, according to Lord Baltimore's charter, through the river of Wighco unto the main ocean—the river of Wighco being the same body of water which by the terms of the compact connects Chesapeake Bay in Virginia with the Pocomoke river in Maryland.

The oyster product of Pocomoke Sound is insignificant compared with that of the Potomac. Even if it were conceded to us, as it ought to be, it is no adequate return for the immense and unparalleled oyster-bearing territory of the Potomac. It is not too much to say that the Potomac will furnish as great a quantity of oyster food in one week in any year as the Pocomoke will in the whole of the year. But to the 5,000 or 6,000 people in Somerset and Worcester counties, who with their ancestors from time immemorial have earned a toilsome livelihood by taking oysters here, it is a matter almost of life and death. There may be fairer fields, but these are at their doors and to work them requires no sundering of hallowed ties and associations.

Is it any wonder then, that there is ill-feeling along the border on this subject? The people of Maryland, directly interested, look upon this transaction much as they regard the demand of Shylock for his pound of flesh. Virginia, through Scarborough, has deceived and overreached Maryland on land, but in return gave her some just concessions on the water. Finding these water privileges more valuable than she at first supposed, she now proposes to take *these* away, and, at the same time, to keep the unjust territorial gains, by which we paid for them, as her own property.

We do not think that when the people of Virginia understand what is sought to be done in this matter they will insist on this injustice; or that Courts of Justice will coincide in a view of the compact of 1785, which seems so devoid of "just and mutual principles for the true interest of both governments."

If then, the term "Fish" applies to "Oysters," and if the 8th section of the compact is applicable to the body now known as Pocomoke Sound, in which the offence is alleged to have been committed, the indictment must set out that the oyster law of Virginia alleged to have been violated was passed with the consent and approbation of the State of Maryland also. This it does not do and cannot do, as it is not the fact.

State vs. Hoofman, 9 Md. 28.

No conviction can be had therefore under the Virginian Statute against citizens of Maryland for taking oysters in Pocomoke Sound.

75th Va. 934.

V.

As to the right of the appellant to be tried in the Courts of Maryland.

This question depends upon the true construction of the 10th section of the Compact, which is in these words:

"All piracies, crimes or offences committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of said bay where the line of division from the south point of Potowmack river (now called Smith's Point) to Watkins' Point, near the mouth of Pocomoke river, may be doubtful; and on that part of Pocomoke river within the limits of Virginia, or where the line of division between the two States upon the said river, is doubtful, by any persons not citizens of the Commonwealth of Virginia, against the citizens of Maryland, shall be tried in the Court of the State of Maryland, which hath legal cognizance of such offense. And all piracies, crimes and offenses, committed on the before-mentioned parts of the Chesapeake bay and Pocomoke river, by any persons not citizens of Maryland, against any citizens of Virginia, shall be tried in the Court of the Commonwealth of Virginia, which hath legal cognizance of such offenses. All piracies, crimes and offenses committed on the said parts of the Chesapeake bay and Pocomoke river, by persons not citizens of either State against persons not citizens of either State, shall be tried in the Court of the Commonwealth of Virginia having legal cognizance of such offenses. And all piracies, crimes and offences committed on the said parts of the Chesapeake bay and Pocomoke river, by any citizen of the Commonwealth of Virginia, or of the State of Maryland, either against the other, shall be tried in the Court of that State of which the offender is a citizen. The jurisdiction of each State over the river Patomack, shall be exercised in the same manner as is prescribed for the before-mentioned parts of the Chesapeake bay and Pocomoke river, in every respect, except in the cases of piracies, crimes and offenses committed by persons not citizens of either State, upon persons not citizens of either

State, in which case the offenders shall be tried by the Court of the State to which they shall first be brought. And if the inhabitants of either State shall commit any violence, injury or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any Court of Record or Civil Magistrate of the State where the offense shall have been committed, having jurisdiction thereof, may enter the appearance of such person and proceed to trial and judgment, in the same manner as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of such offender, both in the State where the offense shall have been committed, and also in the State where the said offender may reside, and execution may be issued by the Court or magistrate giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any Court or magistrate of the State, where such offender may reside, having jurisdiction within the State or county where the offender may reside, in cases of a similar nature, such Court or magistrate shall order execution to issue upon such authenticated judgment in the same manner and to the same extent as if the judgment had been given by the Court or magistrate to which said transcript shall be exhibited."

A brief historical statement of the proceedings that resulted in the compact will throw some light upon its proper interpretation.

When the thirteen colonies had declared on July 4, 1776, that they were free and independent states, they assumed the duties and responsibilities of such and acted as such. The jurisdiction over navigable waters within each State became by public law subject only to the jurisdiction of that State, and as the public law then stood the right of navigation might be regulated by that State, and imposts and duties imposed on the enjoyment of the right. The right of access to the *mare liberum*—the open sea, the highway of nations—became at once a matter of paramount importance to a "free and independent State," and the subject was immediately taken up by the great statesmen controlling the two States.

On November 22d, 1777, on the recommendation of the Congress, Maryland appointed commissioners to meet commissioners from Virginia "to regulate and ascertain the price of labor, manufactures, internal produce and commodities, imported from foreign countries, military stores excepted, and also, to regulate the charges of inn holders." Nothing came of this proposed conference, but Virginia on the 9th day of December, 1777, appointed commissioners to meet those appointed from Maryland "to consider the most proper means to adjust and confirm the rights of each to the use and navigation of and jurisdiction over the Bay of Chesapeake and the Rivers Potowmack and Pocomoke, in order to prevent any difference on these subjects which may interrupt the desirable harmony between the two countries, which is equally the interest of both to cultivate."

On December 21st, 1777, Maryland appointed Daniel of St. Thomas Jenifer, Thomas Stone and Samuel Chase, commissioners to meet those of Virginia, and the next day gave them instructions "for the purpose of settling the navigation of, and jurisdiction over, that part of the Bay of Chesapeake within the limits of Virginia, and over the Rivers Potomack and Pocomoke."

"The General Assembly of Maryland, reposing great trust and confidence in your discretion, abilities and integrity, submit to your wisdom and management, the settling and extent of the jurisdiction proper to be exercised by this State and the Commonwealth of Virginia, over that part of the Bay of Chesapeake lying within the limits of Virginia and over the rivers Potowmack and Pocomoke, as also the free navigation of those waters.

"These are matters of the utmost consequence to the people of both States, and if happily settled in such manner as to give mutual satisfaction, will contribute to keep up and perpetuate that harmony so essential to the interests of neighboring States. * * * * *

"You are to endeavor to settle the point of jurisdiction over that part of the Bay lying within the limits of Virginia, in the following manner:

"That all piracies, crimes or offenses committed on the said part of said Bay, by the subjects of this State, or by any other persons not subjects of the Commonwealth of Virginia, against the subjects of this State, shall be tried by the Court of this State which hath, by the laws of this State, cognizance of the offence; and that all piracies, crimes and offenses committed as aforesaid by the subjects of Virginia, or by any other persons not subjects of this State, against any subject of Virginia, shall be tried in the Court of the Commonwealth of Virginia, which, by the laws thereof, has cognizance of the offense. * *

"That piracies, crimes and offenses, committed as aforesaid, by persons not subjects of either State, against persons not subjects of either State, shall be tried in the Courts of the State in which the offenders shall be first seized in order to be brought to justice. The jurisdiction to be exercised by each State over the rivers aforesaid, cannot, in the opinion of this Assembly, be put on a better or more equitable footing than that in which you are instructed to settle the jurisdiction over that part of the Bay within the limits of the Commonwealth of Virginia."

2 Scharf's History of Maryland, 528.

The exigencies of the war pressed this negotiation aside, but on May 23, 1782, after the surrender of Cornwallis, and before the treaty of peace, Maryland again took up the subject and sent the Honorable Robert Hanson Harrison, the Chief Judge of her General Court, an ambassador to Virginia to invoke her assistance "on the most effective measure for protecting the trade of the Bay of

Chesapeake and the property of people inhabiting the shores thereof."

2 Henry's Life of Patrick Henry, 176.

The Virginia Assembly, on June 1, 1782, on receiving the message of good will through Judge Harrison, replied that it "is strongly impressed with the idea of the common benefit, safety and happiness that will result from the strictest union of the two States, to provide which, in the most effective manner, shall be an object of constant attention on the part of Virginia."

Id. 177.

The Governor was instructed to correspond with Maryland "on the propriety and benefit to both States, of harmonizing as much as possible in the duties, imposts and customs that are or may be laid on commerce." The matter stopped there.

But on February 20, 1784, Jefferson, then in Virginia, wrote to Madison, then attending the Congress at Annapolis, on the subject, who replied explaining the necessity of a joint commission for regulating the navigation of the Potomac.

"The good humor," says he, "into which the cession of the back lands must have put Maryland, forms an apt crisis for negotiations."

Jefferson introduced the subject to Washington, who endorsed the movement and advised concert with Maryland. Acting on that advice, Jefferson conferred with Thomas Stone, one of the Maryland delegates in Congress, and undertook to originate the subject in the Legislature of Virginia.

1 Bancroft's Hist. Constitution U. S., 151.

Urged by both Washington and Jefferson, Edmund Randolph, on June 24, 1784, moved the Virginia Legislature to appoint commissioners to meet others from Maryland "and in concert with them frame such liberal and equitable regulations touching the jurisdiction and navigation of the waters of the Chesapeake Bay and the rivers Potomac and Pocomoke, as may be mutually advantageous to both States;" and Edmund Randolph, George Mason, James Madison, Jr. and Alexander Henderson, were appointed commissioners on the part of Virginia.

2 Rives, Madison, 58.

Stone performed his part of the movement, and on January 16, 1785, the Maryland General Assembly appointed Thomas Johnson, Thomas Stone, Samuel Chase and Daniel of St. Thomas Jenifer, "commissioners for this State, to meet the commissioners appointed by the Commonwealth of Virginia, for the purpose of settling the navigation of, and jurisdiction over, that part of the Bay of Chesapeake which lies within the limits of Virginia, and over the Potomac and Pocomoke."

The commissioners met at Alexandria, March 21, 1785, but on the invitation of Washington, adjourned to Mount Vernon on the 28th.

2 Scharf, 530.

There the compact of 1785 was framed. It was duly reported to the two States and ratified by Maryland, November 21, 1785, and by Virginia on January 3, 1786.

Code of Virginia, 1878.

The *crime* or *offence* for which the appellant was tried and convicted was committed in Pocomoke sound.

If we be wrong in the contention that when the compact was made, what is now called Pocomoke sound was in fact the mouth of Pocomoke river where it empties into Chesapeake bay, the compact on its face shows that it must be treated as forming at that time a part of Chesapeake bay. Unless this view be adopted, the rejection of our claim that Pocomoke sound was in fact merely the mouth of Pocomoke river leads necessarily to the result that the compact made no provision whatever for Pocomoke sound, a body of water, which the Court below, in their opinion, say, "has an area of about ninety square miles, and is one of the largest sub-divisions of Chesapeake bay."

If it was and is neither part of the Pocomoke river nor of the Chesapeake bay, then the compact omits and ignores it altogether.

This conclusion is, of course, inadmissible. And hence, even accepting as correct the contention of the appellee, that citizens of Maryland have no right of free fishery in Pocomoke river in common with citizens of Virginia, by virtue of the compact, and that Pocomoke sound is not to be regarded as a part of Pocomoke river, it follows necessarily that what we now call Pocomoke sound must be considered as embraced in the designation of "the Chesapeake bay," and that the crime or offence for which the appellant was convicted was committed in the Chesapeake bay, within the limits of Virginia.

Such being the case, the question is whether for such crime or offence, he was entitled to be tried in the Courts of Maryland.

The language of the compact is broad and comprehensive. Its words obviously include every species of criminal offense from the highest to the lowest grade. Viewing the instrument as a solemn and deliberate treaty between two independent sovereignties, as Maryland and Virginia then were towards each other, the terms employed are singularly clear and absolutely without restriction or qualification.

They purposely embrace offenses against international law—against the common law as known to and existing in the two commonwealths, and also against the crimes and misdemeanors recognized, created or defined by their respective statutes.

The act of taking or catching in Chesapeake Bay the oysters of the people of Virginia, whether considered as individuals or in their aggregate capacity as constituting the Commonwealth, was not then declared a crime or felony, with penalties prescribed for its punishment. But there is nothing in the compact which limits the meaning of the terms "piracies, crimes or offences" to "piracies, crimes or offences" *then* known to and recognized by International, Statute or Common Law. Indeed the careful use of the word "*all*" in the description of the "piracies, crimes and offences," which, when committed by Marylanders against Virginians upon the Chesapeake Bay *within the limits of Virginia*, could only be tried in the Maryland Courts, precludes the adoption of any such narrow and unreasonable interpretation.

The act for which the appellant was indicted and convicted, being thus shown to be a "*crime*" against the statute of Virginia, and as such being obviously within the meaning of the broad terms set out in the compact, and it being admitted that the appellant, the alleged criminal, offender or culprit, was a citizen of Maryland at the time of the alleged "crime or offense," and it being shown that the *locus in quo* was the Chesapeake Bay *within the limits of Virginia*, we respectfully insist that under the plain, distinct and express language of the compact, the appellant can only lawfully be tried for such alleged offence in the Courts of Maryland, and that consequently his trial and conviction therefor in Accomack County Court were unlawful and void.

The compact provides, first, for "piracies, crimes and offences," committed by any persons not citizens of Virginia against citizens of Maryland.

These are to be tried in the Maryland Courts.

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The compact provides, first, for "piracies, crimes and offences," committed by any persons not citizens of Virginia against citizens of Maryland.

These are to be tried in the Maryland Courts.

It provides, secondly, for "piracies, crimes and offences" committed by "any persons not citizens of Maryland against any citizens of Virginia."

These are to be tried in the Virginia Courts.

It provides, thirdly, for "piracies, crimes and offences" committed "by persons not citizens of either State," against persons not citizens of either State.

These are to be tried in the Courts of Virginia.

It provides, fourthly, for "piracies, crimes and offences" committed by Marylanders against Virginians and by Virginians against Marylanders.

These are to be tried in the Courts of the State of which the offender is a citizen.

Now here the appellant is a citizen of Maryland, and was so at the time of the alleged offence. The crime or offence imputed to him is claimed to have been committed within the limits of Virginia, upon waters constituting a part of Chesapeake bay. How then can he be lawfully denied the benefit of the careful stipulation in the compact, which, in exchange for a corresponding privilege secured to Virginians, guaranteed to him the right to be tried in the Courts of his own State?

Two answers are given to this plain and simple question, but we respectfully submit that neither of them is sufficient.

FIRST ANSWER.

It was contended below by the counsel for Virginia, that the "piracies, crimes and offences" mentioned in the compact, are only "piracies, crimes and offences" committed by citizens of one of the States against citizens of the other State, and, consequently, that inasmuch as the appellant is not charged with having committed a "crime or offence" against any *citizen* of Virginia, but with a crime or offence against the *Commonwealth* of Virginia, the compact does not apply.

In short, he is charged with stealing or attempting to steal, within the limits of Virginia in the Chesapeake bay, *the oysters of the Commonwealth* that belong to all her citizens, and, it is contended, that while this is a crime, it is not a crime within the meaning of and covered by the compact.

Of course, this contention, if sound, would necessarily lead to the conclusion that if, instead of being indicted for stealing the oysters *belonging to the Commonwealth*, he were indicted for stealing the oysters of *private Virginia proprietors*, assignees of the Commonwealth under rental of leased oyster beds, even though taken from the same locality as that described in the indictment, the compact would apply, and he could lawfully claim his legal right to be tried in a Maryland Court.

This suggestion would seem of itself to demonstrate that the distinction attempted to be drawn between a crime against a *citizen* of Virginia, in stealing his private property, and a crime against the aggregate body of the citizens constituting the *Commonwealth*, cannot be accepted as sound, and that the plain language and clear intent of the compact are not to be frittered away by any such subtlety.

The basis, or apparent basis, for this contention, is claimed to be found in the opinion of the Court of Appeals of Virginia in the case, already cited, of Hendricks vs. The Commonwealth, 75 Va. 934.

Rejecting, as the counsel for Virginia do, the authority of that part of the opinion in that case which sustains the contention of Maryland as to the free right of fishery of her citizens in Pocomoke river, it is a little surprising that they lay so much stress upon that other part of the opinion which makes the distinction now under consideration.

When the opinion is examined it will be found, however, that if the portion quoted by us as declaring the right of Marylanders to the free right of fishery in Pocomoke river is to be treated as an *obiter*, the other part relied on by the other side, relating to section 10 of the compact, is equally open to the same criticism.

The facts were these:

George Hendricks, a citizen of Maryland, was indicted in the County Court of Fairfax county for "unlawful fishing" in the Potomac river. The offence with which he was charged was alleged to be in violation of a law passed by the mutual consent and approbation of both States for the regulation of fishing in Potomac river, and "he contended that he was entitled to be tried in a Court of Maryland and could not be tried in a Court of Virginia," "because another law passed by like mutual consent had given citizens of Maryland violating the first-named law the right of trial in a Maryland Court."

The Court below (Record, 63) say that "*his contention was perfectly sound and that the Virginia Court of Appeals sustained this defense;*" but in this latter statement the Court below are in error, for while his contention, as we respectfully insist, was "perfectly sound," the Court of Appeals of Virginia, in fact, over-ruled it and affirmed the judgment of conviction rendered by the County Court of Fairfax county.

Judge Anderson, in delivering the opinion of the Court, declares that article 10 of the compact was not intended to embrace offenses against the laws and regulations with regard to fish, which had been disposed of by article 8, and as Hendricks was indicted for violating a law with regard to fish, passed in pursuance of article 8, by the concurrent Acts of both States, he could not claim the benefit of article 10.

Having thus decided the precise question before the Court, Judge Anderson proceeds quite unnecessarily to use the following language relied on by the appellee:

"But if the 10th article can be regarded as a restriction upon the concurrent jurisdiction given to the two States by mutual and concurrent legislation and regulation with regard to fish in said waters, it is, as we have seen, only applicable to offences against the citizen. The compact in the 10th article *seems* to have been carefully limited to offences against the citizen, as distinguished from offences against the State."

This language undoubtedly affords ground for the contention of the appellee in this particular, but although the case was pressed upon the Court below as decisive of the question, we find that the Court below not only do not adopt it, but, on the contrary, declare in their opinion, as already shown, that Hendricks' "CONTENTION WAS PERFECTLY SOUND."

The truth is, that Hendricks Case was one involving the meaning and effect of the 7th and 8th articles of the compact, and only incidentally, if at all, the scope of the 10th article; and therefore what is said in regard to this last article is as much an *obiter dictum*, as what is said in the same opinion about the free right of fishery in the Pocomoke.

But if it be assumed that the opinion of the Court of Appeals is not to be regarded as merely *obiter*, but as an adjudication upon a question fairly presented by the record, the decision is not final and binding, but is open to review by this Court, and reversal, if believed to be erroneous.

The decision is not a construction of a *Virginia* Statute, to be accepted and followed by this Court, but it is a construction of a *compact between Maryland and Virginia*, which only this Court can *conclusively* interpret and expound.

And hence, the simple question is whether the 10th article of this compact, properly construed, is to have the narrow meaning sought to be put upon it by the counsel for Virginia. When it speaks of "piracies" committed by citizens of Maryland against citizens of Virginia, for which the citizens of Maryland can only be *tried* in the moke river is to be treated as an *obiter*, the other part relied on by the other side, relating to section 10 of the compact, is equally open to the same criticism.

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Courts of Maryland, does it mean that for the *civil* loss to the Virginian by such act of piracy, he must sue the Maryland offender in the Maryland Courts, but that for the criminal wrong to the Commonwealth of Virginia, by such high crime, he is still liable to be prosecuted and tried in Virginia, and hanged there if convicted?

Does it mean that for robbery, or assault with intent to kill, committed by a Marylander upon a Virginian, in the Chesapeake bay, within the limits of Virginia, he is entitled to the right of trial in a Maryland Court, guaranteed by the 10th article of the compact, because these are offences against the citizen, while that for an alleged murder of a Virginian, within the same limits, he must stand his trial in Virginia, because this is to be treated as an offence against the State?

What crimes or offences are there that can be committed against the State, which do not involve also the element of crime against the citizen?

Homicide, Rape, Abortion, Arson, Assault, Bigamy, Burglary, Counterfeiting, Forgery, Embezzlement, Larceny—are not these offences as well against the individuals as against the State—and is it not because they are offences against individuals, that they are punishable as offences against the aggregation of individuals which make up the State?

But if there be "piracies, crimes and offences," which, if committed by citizens of Maryland against citizens of Virginia upon the Chesapeake Bay, within the limits of Virginia, can only lawfully be tried in the Courts of Maryland, but which, if committed by citizens of Maryland against the Commonwealth of Virginia, within the same identical limits, can lawfully be tried in Virginia, the provision of the compact is made absolutely worthless, for all that need be done to escape its protection will be to indict the offender for a crime against the Commonwealth, and then, when he invokes the benefit of its provision his demand may be denied, by the simple suggestion: "You are not on trial for the crime against the Virginia citizen, but for the crime against the Commonwealth, which you have committed in your crime against one of her citizens."

But further, if the distinction drawn between crimes against the citizen and crimes against the Commonwealth be sound in some cases, can it be drawn in this case of the appellant?

Is the crime of taking or catching oysters that belong to the Commonwealth of Virginia a crime against the citizens of Virginia? If it is, then even the distinction relied on will not wrench the appellant from the protection of this 10th article of the compact.

Do not oysters that belong to the Commonwealth belong in common to the citizens of the Commonwealth—and is not the crime of catching them, or stealing them, a crime against the citizens of the Commonwealth, even if it be a crime also against the Commonwealth?

That this view is sound seems to be directly established by this Court in McCready vs. Virginia, 94 U. S. 391.

SECOND ANSWER.

The Court below, as has been stated, do not put their decision upon the distinction claimed to have been made in Hendricks' case, although that case was pressed upon them as an authoritative adjudication of the question.

On the contrary, they rest their opinion upon the effect of the Black-Jenkins award fixing the boundary line in Pocomoke sound between Maryland and Virginia, and they declare that as this boundary line is no longer "*doubtful*," and as the offence was committed on the Virginia side of the line, the compact does not apply.

This view of the Court below seems to be so plain a misapprehension of both the letter and spirit of the 10th article of the compact, that it is difficult to understand how the learned judges could have fallen into such an error.

Indeed, their construction of this article destroys it altogether, for its meaning and intent are the direct contrary of that declared by them.

A simple reproduction of its language will serve, we hope, to make this too clear for discussion:

"All piracies, crimes or offences *committed on that part of Chesapeake Bay which lies within the limits of Virginia*, OR that part of said bay where the line of division from the south point of Potowmack river (now called Smith's point) to Watkins point, near the mouth of Pocomoke river, may be doubtful * * * shall be tried," &c., &c.

Now the Court below, ignoring altogether the words "committed on that part of Chesapeake bay which lies *within the limits of Virginia*," proceed to the second part of the clause, and reading the word *or* as if it was the word *on*, come to the strange conclusion that as the dividing line is no longer doubtful since the Black-Jenkins award, and as the *locus in quo* was south of the dividing line and *within the limits* of Virginia, therefore the compact does not apply.

In the opinion of the Court below, it is declared that "no law could be more just and judicious than the tenth section of the compact, containing the provisions relied on;" and yet, when they come to apply these provisions, they deal with the question as if the object of the compact was simply to prevent a conflict of jurisdiction in cases arising on the one side or the other of a *then* doubtful dividing line between the two States.

Upon the view of the Court below a case of "crime" committed by a citizen of Maryland against a citizen of Virginia on the Chesapeake Bay, *near the Capes*, does not fall within the stipulation of the 10th section of the compact, and now that the line of division is no longer doubtful, such a crime, committed anywhere south of the boundary line fixed by the Black-Jenkins award, is in like manner, not within its protection.

This construction palpably repeals and annuls the 10th section, and, we respectfully submit, cannot be correct.

The stipulation under consideration was intended to cover every foot of the Chesapeake Bay *within the limits of Virginia;* that is to say, south of the true line of division between the two States; and after making this provision in terms too explicit for misunderstanding, its framers, for the purpose of preventing the possibility of mistake as to a case happening on or near the dividing line, inserted the alternative clause which the Court below seem so strangely to have misinterpreted.

The meaning of the whole sentence is this, viz.: Wherever the limits of Virginia upon the Chesapeake Bay are *certain*, AND so, too, wherever they are *doubtful*, the Maryland Courts shall have the *exclusive* right to try citizens of Maryland charged with the commission of crime against citizens of Virginia, within such limits.

If the object had been to abandon her jurisdiction ONLY *where the line of division was doubtful*, the first clause of the sentence would never have been inserted.

But inasmuch as the clear purpose of the compact was to reserve to Virginia the right of trying persons, *other than citizens of Maryland*, charged with "piracies, crimes and offences" committed within the limits of Virginia upon Chesapeake bay, it was necessary, in order to secure her in the exercise of this right, to provide that her jurisdiction should not be lost even if the crime should prove to have been committed where the line was *doubtful;* that is, on what might be claimed by the accused to be on the Maryland side of the line.

As to Marylanders, the agreement was that no matter where they might commit crimes against Virginians *within the limits of Virginia upon Chesapeake bay*, whether in those parts of the bay clearly and certainly within her limits, or in those parts as to which the boundary might be doubtful, the Courts of Maryland should have exclusive jurisdiction. And in consideration of this agreement, no person *other than a Marylander* should be allowed to escape trial in Virginia Courts for offences committed within her limits, upon Chesapeake bay, by denying the jurisdiction of Virginia, upon the allegation that the *locus in quo* was in reality on the Maryland side of the "doubtful" boundary line.

When it is borne in mind that the paramount purpose of the compact was to settle and regulate the "navigation of and jurisdiction over that part of the Bay of Chesapeake *within the limits of Virginia* and over the Rivers Potowmack and Pocomoke," the correctness of Maryland's contention upon this point cannot, we insist, be successfully questioned.

We submit, therefore, that the absolute right of the appellant, under the 10th section of the compact, to be tried in the Courts of Maryland, is clearly established, and that neither the unsubstantial distinction attempted to be made by the Court of Appeals of Virginia in Hendricks' Case, 75 Virginia, 934, *between crimes against the citizens of a State, and crimes against the State itself*, nor the view of the learned Court below, that since the settlement of the boundary line by the Black-Jenkins award, the 10th section of the compact is no longer applicable, can be accepted as a sufficient answer to Maryland's contention upon this important question.

VI.

As no serious objection was made in the Court below to its jurisdiction to hear and determine the case of the appellant, and as the Court themselves in their opinion do not indicate any doubt or difficulty upon this question, argument in support of the jurisdiction is not believed to be necessary.

Upon the whole case, we respectfully submit that the order appealed from should be reversed and the appellant discharged from custody.

JOHN PRENTISS POE,
Attorney Gen'l of Maryland,

BRADLEY T. JOHNSON,
Special Counsel for Maryland,

THOMAS S. HODSON,
Counsel for Appellant.

153-155

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1054.

ROBERT L. WHARTON, *Appellant*,

VS.

JOHN H. WISE, *Sheriff of Accomac County, Virginia.*

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

BRIEF OF R. TAYLOR SCOTT, ATTORNEY-GENERAL OF VIRGINIA, FOR WISE, SHERIFF, ETC.

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The Case Stated.

Robert L. Wharton and *Severn Nelson* were indicted in the county court of Accomac county, in the Commonwealth of Virginia, for this that being *non-residents* of said Commonwealth in the said county of Accomac, on the day and year and at the place in the several indictments specified, in the waters of said Commonwealth and within the jurisdiction of the county court of Accomac county, said Wharton and Nelson took and caught oysters against the statutes of said Commonwealth of Virginia n such cases made and provided.

The statute violated directs that "if any person *other than a resident of this State* take or catch oysters or other shell-fish in any of the waters of this State he shall, upon conviction thereof, be fined five hundred dollars."

[Acts of 1891–'92, c. 363, sec. 10, p. 603.]

Wharton and *Nelson* [each] pleaded the "special pleas" found upon page 8 of the record. The Commonwealth demurred to the pleas and the demurrers were sustained; they then pleaded "not guilty," issue was joined, the jury found *each* guilty "as charged in the indictments," imposed the fine fixed by statute and the trial court pronounced judgment.

Wharton and Nelson petitioned the judge of the circuit court of the United States for *Fourth* Circuit for "writ of *habeas corpus*" and the writ was granted.

John H. Wise, sheriff of Accomac county, made return to the writs [Rec., pp. 12–13]; the case was heard *in Richmond* June 13 and 14, 1893, and September 18th of that year *in Baltimore* the writs were denied and appeal taken to this court.

The grounds of error assigned, *four* in number, will be found upon page 67 of the record, and the court's opinion upon pages 53 to 65

The Pleas.

The "*special pleas*" [Rec., p. 8] present the real issue in this controversy, as follows:

"The *traverser* in his own proper person says that at the time of the alleged offence charged in the indictment, the traverser was and still is a *bona fide* citizen of the State of Maryland, residing in Somerset county of said State, and that the act of Assembly of the Commonwealth of Virginia under which the indictment is found against him has not been adopted, sanctioned, ratified or confirmed by the General Assembly of Maryland, &c. So the traverser says that under and by virtue of a public agreement between the Commonwealth of Virginia and the State of *Maryland*, duly entered into between said two States and commonly known as the compact of 1785 between Virginia and Maryland, which said compact the traverser says has never been repealed, abrogated, rescinded or annulled, but which is still in fact a subsisting and operating compact between said two States, this court has no jurisdiction to try the traverser for and concerning the said alleged offence in said indictment charged, the *Pocomoke sound,* in said indictment mentioned, being in fact a part of the *Pocomoke river* in said compact referred to."

The resolutions of the General Assembly of Virginia agreed to *June, 1784,* and the text of the compact of *1785* will be found on pages 16 to 20 of the record, and that part adopted by Messrs. J. S. Black, of Pennsylvania, and Charles Jenkins, of Georgia, in their award, formulated into statute laws by Maryland and Virginia, in the Code of Virginia of 1887. "Section 13," p. 59, contains this *proviso:*

"That the said compact remains obligatory, except so far as it may have been superseded by the provisions of the Constitution since formed for the United States, and it shall be faithfully observed and kept by this government and all its citizens so far as may not be incompatible with the said Constitution. Amongst the articles of said compact are, etc. . . . [Here follow the "*seventh,*" "*eighth,*" "*tenth*" and "*eleventh*" sections or articles of the compact of *1785.*]

The Problem to be Solved.

(a) What is the true meaning, purpose and intent of the compact of 1785, *especially* sections or articles "*eight* and *tenth.*"?

(b) What personal rights or privileges, if any, does it confer upon citizens of Maryland *in Pocomoke river or sound?*

Virginia's Jurisdiction.

Over the portion of Chesapeake bay known as "*Pocomoke sound*" and Pocomoke river within the limits of Virginia the

Commonwealth of Virginia holds absolute power and jurisdiction, and can legislate *without the consent of Maryland.*

Prior to the revolution this jurisdiction and power belonged to *the King;* independence achieved, passed to and vested in the sovereign Commonwealth.

The navigable waters and the soils under them within the territorial limits of Virginia, subject to the restrictions and limitations of the Federal Constitution, in *fee simple* belong to Virginia. The Commonwealth can prohibit all acts which impair or make less valuable these waters and the soils under them, and the statute under which *Robert L. Wharton* and *Severn Nelson* were prosecuted in the county court of Accomac county is the proper exercise of legislative power, and must be obeyed and conformed to *by Marylanders.* It does not regulate commerce nor does it abridge or impair any "privilege" or "immunity" of interstate citizenship, and is not obnoxious to "the compact of 1785."

This construction of the law is sustained by the following cases:

New Orleans v. *U. S.*, 10 Peters, 662.
Martin v. *Waddell*, 16 Peters, 410.
Pollard v. *Hogan*, 3 How., 212.
Smith v. *Maryland*, 18 How., 71–74.
Hardin v. *Jordan*, 140 U. S., 382.
McCready v. *Virginia*, 94 U. S., 391.

In *Ill. Cent. R. R. Co.* v. *People of State of Ill.*, 146 U. S., 387, *Mr. J. Field*, speaking for *this* court, said:

It follows from the views expressed, and it is so declared and adjudged, that the State of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of *April 6, 1869*, purported to grant to the Illinois Central Railroad Company, and that the act of *April 15, 1873*, repealing the same, is valid and effective for the purpose of restoring to the State the same control, dominion and ownership of said lands that it had prior to the passage of the act of April 16, 1869."

Again: the county court of Accomac county, under the Constitution and laws of Virginia, is a court of *original* criminal jurisdiction, and its judgment conclusive and final. This court, upon writ of *habeas corpus*, cannot examine into its proceedings nor reverse its judgments.

Wharton's and *Nelson's* imprisonment is not unlawful unless the judgment be *an absolute nullity;* but it is not a nullity, though it may be erroneous because the court had general jurisdiction over the offence in the indictment charged, and if not obnoxious to the compact of 1785, the court's judgment must be enforced. [*Ex parte* Tobias Watkins, 3 Peters, 205.]

The Compact of 1785.

In construing and giving effect to this compact *this court* will take judicial notice that "*the true boundary line between the States of Maryland and Virginia, so far as they are coterminous one with the other,*" has been ascertained distinctly and accurately marked and its courses, etc., formulated into statutes enacted by each State and accepted and ratified by Congress; therefore no part of it *doubtful.* [Code of Va., 1887, sec. 13, pp. 59 to 64; 20 U. S. Stats. at Large, p. 482.]

Virginia's Oyster Legislation.

On *February 12, 1819*, an act was passed by the General Assembly of Virginia to reduce into one act the acts now in force and prevent the destruction of oysters within the Commonwealth. [Code 1819, Vol. II., p. 314.]

February 3, 1832, an act was passed to prevent the destruction of oysters in the counties of Northampton and Accomac. [Acts 1831–'32, c. 192, p. 260.]

In 1846 an act was passed forbidding all persons other than actual residents and inhabitants of Virginia from taking oysters in the waters of Accomac county, except in such rivers and portions thereof as are common to Virginia and other States.

The "*Code of Virginia, 1849*," *sec. 12*, provides: "If any person, other than a citizen of this State, shall take oysters or terrapins in the waters thereof, or *in the rivers* Pocomoke and Potomac, he shall forfeit two hundred dollars. But this section shall not extend to a citizen of Maryland taking oysters or terrapins *in the said mentioned rivers*."

The act of *1852* made it unlawful for citizens of Virginia to take oysters with dredges in the waters of *Tangier* and *Pocomoke* sounds, or any waters adjacent thereto, in the county of Accomac; *that of April 23, 1867*, forbade persons, other than residents of the State, to take or plant oysters in the rivers of the State, or *in the rivers Pocomoke or Potomac*.

In 1870 depredators and trespassers upon Tangier and Pocomoke sounds were captured and their boats, etc., confiscated. So serious was the affair that the Governor, in his message of October 24th that year, made report to the General Assembly.

These depredators and trespassers were then, as now, *Marylanders*, and then, as now, defended by the best legal talent of that State. *Her Attorney-General, Hon. John W. Crisfield*, and *Hon. James U. Dennis* appeared in their behalf. A temporary boundary line was agreed upon and a resolution passed "That the Governor of Virginia be authorized to discharge from arrest the citizens of Maryland arrested for violation of the laws of Virginia, in trespassing upon her territory and gathering oysters within her boundaries, and to release the vessels seized."

The trespassers and intruders were released and the confiscated property restored.

In 1874 an act was passed "for the preservation of oysters and to obtain revenue for the privilege of taking them within the waters of the Commonwealth."

[Acts 1874, c. 214, p. 238.]

"*Section 22*" as follows—viz.: "If any person [other than a citizen of this State] shall take or catch oysters or other shell-fish in any manner, or plant oysters in the waters thereof or in *the rivers Potomac or Pocomoke*, he shall forfeit $500 and the vessel, tackle and appurtenances.

"And any *non-resident* shall be deemed to have violated this section. . . . . *But* this section shall not extend to citizens of Maryland taking oysters *in said mentioned rivers.*"

The General Assembly of Virginia, *February 8, 1875*, construed this *section.*

"1. Be it enacted, That the true meaning of said *twenty-second section* of the said act was to confer upon citizens of Maryland the privilege of taking oysters in the Potomac and Pocomoke rivers, and *not in Pocomoke bay or sound.*

"2. That insisting and declaring that the true line between this State and the State of Maryland east of the Chesapeake bay is the line known as the Calvert and Scarborough line, and that a part of the county of Somerset claimed by the State of Maryland is south of that line and of right part of the territory of Virginia. Yet in a spirit of comity and good will to a sister State, be it further enacted that the privilege of taking oysters *in Pocomoke bay* shall be enjoyed by the citizens of Maryland in common with citizens of Virginia north of a right line running from Cedar strait to the intersection of the Calvert and Scarborough line with the Pocomoke river.

3. The privilege conferred by this act may be withheld at the pleasure of the General Assembly.

4. This act shall be in force from its passage"—
and was *approved February 5, 1875.* [Acts 1874–'75, c. 86, p. 64.]

Pocomoke Bay.

In the Virginia State Library can be seen a map of the country between Albemarle sound and Lake Erie, comprehending the whole of Virginia, Maryland and Delaware, with parts of several other of the United States, engraved for Jefferson's Notes on Virginia. The country on the eastern side of the Alleghany mountains is taken from Frye and Jefferson's map of Virginia, made in 1775; also, "a chart" for the navigation of Chesapeake bay, and upon it will be found "*Pocomoke river*" and "*Pocomoke bay.*" The date of this chart *January, 1776.* Map and chart were used as evidence in behalf of John H. Wise, sheriff, etc., in the Circuit Court, and though not copied into, belong to the record. They were omitted by agreement of counsel, with right to produce them when desired by counsel or required by the court. Upon "the chart" there is a line designated thus: "*Limites entre Maryland et Virginæ.*" It begins at a point upon *Pocomoke bay* overland in a direct line to the Atlantic ocean.

This chart is "an object lesson" and demonstrates that *in January, 1776*, "Pocomoke river" and "Pocomoke bay" or sound" were known to be separate and distinct bodies of water, and that this was known *more than a century* before the compact of 1785 was made is conclusively established by many ancient documents in the possession of Virginia and Maryland, among them the following, viz.:

1. Maryland's Council's proceedings. [Liber H. H., folio 268.]

A commission dated *August 22, 1666*, directed that the county of Somerset be laid off as follows: "Bounded on the south by a line drawn from Watkins' Point; being the north point of that bay into which the river Wighco (formerly called Wico-comico and afterwards *Pocomoke* and Wico-comico again) doth fall."

2. The report of Edmond Scarborough and Philip Calvert of the line run by them between the colonies of Maryland and Virginia, on the eastern shore, *dated June 26, 1668*. They say "after full and perfect view taken of the point of land made by the north side of *Pocomoke bay* and the south side of Annamessex bay have and do conclude the same to be Watkins' Point, from which said point, so-called, we have run an east line

agreeable with the extremest part of the westernmost angle of the said Watkins' Point over *Pocomoke river* to the land near Robert Holston's," etc. *This was one hundred and seventeen years before "the compact of 1785."* [Rec., p. 25.]

3. The grant of Francis Nicholson, governor, etc., to Francis McKenney and Henry Jenkins, dated *25th April, 1702.* [Rec., p. 22.]

4. The grant of Beverly Randolph to Sacker Nelson, *dated 4th May, 1787.* [Rec., pp. 22–23.]

, The evidence before the circuit court [Rec., pp. 20–53] beyond peradventure proves that *Pocomoke river* and *Pocomoke sound* are separate and distinct bodies of water; that they were recognized and known to the good people of Maryland and Virginia in their colonial days and from the beginning of their independence; that this knowledge was theirs when the compact dated March 28, 1785, was made at Mt. Vernon by Daniel of St. Thomas Jenifer, Thomas Stone and Samuel Chase, Esquires, on the part of Maryland, and George Mason and Alexander Henderson, Esquires, on the part of Virginia; that Virginia has exercised undisputed jurisdiction over Pocomoke sound and enforced her laws against all trespassers and intruders; that her title to the sound *south* of the line established by the Black and Jenkins award is complete and perfect, and that the boundary line between Maryland and Virginia nowhere is in doubt. In the light of these facts, following the accepted "canons of construction" laid down by this court, after careful examination of *the entire compact*, giving effect to the words used in their natural and ordinary meaning, and seeking *the intent* of the high contracting parties—the sovereign States, Virginia ana Maryland—I submit my construction of the "compact," and especially the *eighth* and *tenth* sections or articles.

The compact of 1785 construed.

The object and purpose of "the compact" is declared in the resolutions of the General Assembly of Virginia adopted *June*, 1784: "Whereas great inconveniences are found to result from the want of some concerted regulations between this State and the State of Maryland touching the jurisdiction and navigation of the river Potomac:

"*Resolved*, That George Mason, Edmund Randolph, James Madison, Jr., and Alexander Henderson, Esquires, be appointed commissioners, and that they, or any three of them, do meet such commissioners as may be appointed on the part of Maryland, and in concert with them frame such liberal and equitable regulations concerning the said river as may be mutually advantageous to the two States, and that they make report thereof to the General Assembly.

"*Resolved*, That the Executive be requested to notify the above appointment, *with the object of it*, to the State of Maryland, *and desire its concurrence in the proposition.*" [Rec., p. 16.]

Though the purpose and *intent* of the "compact" is so clearly and pointedly stated, counsel for Wharton and Nelson, contend that under it *citizens of Maryland* have the right to take oysters in *Pocomoke sound*, and that the act of Assembly under which their clients were prosecuted and convicted is null and void because not adopted, sanctioned, ratified or confirmed by the General Assembly of Maryland.

To construe properly the "contract" we must go back to the time it was made, 1785. Then the boundary line between Maryland and Virginia was unsettled, and the dispute, not confined to "war of words," continued until the Black and Jenkins award, January 16, 1877. Chesapeake bay belonged to Virginia, its waters were hers and her control over it *absolute*

By the "*first*" clause of the compact of 1785, Virginia disclaimed all right to impose toll duty or charge or restraint on vessels sailing through the capes to the State of Maryland or from that State through the capes, and agreed that the waters of Chesapeake bay and *Pocomoke river within the limits of Vir-*

ginia be forever a common highway for the use of their citizens.

The "*second*" conferred upon citizens of Virginia the right to enter any of the rivers of Maryland as a harbor or for safety against an enemy without payment of port duty or other charge.

The "*third*" provides for "war-vessels" of either State, and exempts them from port duty or other charge.

The "*fourth*" relates to commerce, and the "*fifth*" of like import.

The "*sixth*" dedicates the Potomac river to navigation and commerce as a common highway for the citizens of Virginia, Maryland and the United States.

The "*seventh*" secures to the citizens of Maryland and Virginia property rights in the shores of *the Potomac river* adjoining their lands, with right to make wharves and take fish.

The "*eighth*" provides that "all laws and regulations which may be necessary for the preservation of fish or for the performance of quarantine in the river Potomac, or preserving and keeping open the channel and navigation thereof, or of *the river Pocomoke* within the limits of Virginia, by preventing the throwing out ballast or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States."

The "*ninth*" provides "light-houses, beacons, buoys or other necessary signals" upon Chesapeake bay "between the sea and the mouths of *the rivers* Potowmack and Pocomoke and upon the river Potowmack at the expense of both States."

The "*tenth*." All piracies, crimes or offences committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack river (now called Smith's Point) to Watkins' Point, near the mouth of the Pocomoke river, may be doubtful; and on that part of Pocomoke river, within the limits of Virginia, or where the line of division between the two States upon the said river, is doubtful, by any persons not citizens of the Commonwealth of Virginia, against the citizens of Maryland shall be tried in the court of the State of Maryland which hath legal cognizance of such offence. And all piracies, crimes and offences committed on the before-mentioned parts of Chesapeake bay and Pocomoke river by any persons not citizens of Maryland against any citizens of Virginia, shall be tried in the court of the Commonwealth of Virginia which hath legal cognizance of such offence. All piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river, by persons not citizens of either State, against persons not citizens of either State, shall be tried in the court of the Commonwealth of Virginia having legal cognizance of such offences; and all piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river, by any citizen of the Commonwealth of Virginia, or of the State of Maryland, either against the other, shall be tried in the court of that State of which the offender is a citizen. The jurisdiction of each State over the river Potowmack shall be exercised in the same manner as is prescribed for the before-mentioned parts of Chesapeake bay and Pocomoke river, in every respect, except in the case of piracies, crimes, and offences committed by persons not citizens of either State, upon persons not citizens of either State, in which case the offenders shall be tried by the court of the State to which they shall first be brought. And if the inhabitants of either State shall commit any violence, injury, or trespass to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any court of record, or civil magistrate of the State where the offence shall have been committed, having jurisdiction thereof, may enter the appearance of such person and proceed to trial and judgment in the same manner as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of such offender, both in the State where the offence shall have been committed and also in the State where the said offender may reside, and execution may be issued by the court or magistrate giving such judgment in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any court or magistrate of the State where such offender may reside, having jurisdiction within the State or county where the offender may reside, in cases of a similar nature, such court or magistrate shall order execution to issue upon such authenticated judgment in the same manner, and to the same extent, as if the judgment had been given by the court or magistrate to which such transcript shall be exhibited.

The "*eleventh*" permits vessels entering any port on the Potomac to be libeled or attached for debt by process from the State in which the vessel entered. "And if the commercial regulations of either State shall be violated by any person carrying on commerce in *Potowmack or Pocomoke rivers*," the offending vessel and cargo may be seized by process from the State whose laws are violated; authorizes the arrest of "fugitives from justice" [*civil* and *criminal*] upon any part of Chesapeake bay, or "*the rivers aforesaid*," by process of the State from which the person is a fugitive, or property being removed; allows service of "process" from Virginia on any part *of said rivers* upon persons *not* citizens of Maryland and their property, and from Maryland, on *said rivers*, upon persons *not* citizens of Virginia and their property; and provides that in all trials had under the "compact" citizens of each State shall attend as witnesses in the other, when summoned by the court or magistrate having jurisdiction.

The "*twelfth*" confers upon the citizens of Virginia and Maryland holding lands in both States the right to carry to their domicil the products of the land, chattels and effects without duty, tax or charge.

The laws of *the States* are the laws as construed and applied by *State courts.*

"*Beauregard* v. *New Orleans,*" 18 How., 502.

Chief Justice Marshall refused to admit and did not follow the distinction taken in "*Hamilton* v. *Dudley,*" 2 Pet., 524. He said "the judicial department of every government is the rightful expositor of its laws and emphatically of its supreme law" and in "*Elmendorf* v. *Taylor,*" 10 Wheat, 159, "the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

Mr. J. McLean in the very remarkable case *Green* v. *Neal,*" 6 Peters, 298, in which *this* court reversed its own construction of Tennessee's statute of limitations and adopted that of the Tennessee court said:

"The decisions of the highest judical tribunals of a State should be considered as final by this court, not because the State tribunal in such case has any power to bind the court, but because in the language of the court in "*Shelby et als v. Guy,*" 11 Wheat, 361, "a fixed and received construction by a State in its own court makes a part of the statute law."

In the words of *Chief-Justice Taney* in "*Martin* v. *Waddell,*" 16 Peters, 410, "in the case referred to the sanction of the judicial authority of the State is given to it and if the words of the letters patent had been far more doubtful than they are, this decision made upon such a question with great deliberation and research, ought in our judgment to be conclusive.

The grammatical and ordinary construction of the *eighth* clause confines and limits "joint legislation" over the Pocomoke river to the preservation of its channel and keeping open navigation "by preventing the throwing out of ballast or giving any other obstruction thereto."

But it is contended that Virginia's Court of Appeals in the case before cited, "*Hendricks* v. *Commonwealth,*" 75 Va., 939–940, has so construed the *eighth* clause as to give to citizens of

Maryland the privileges and rights claimed by Wharton and Nelson, but this contention is not supported by law or fact.

Hendricks, a citizen of Maryland, was indicted in the county court of Fairfax county, Virginia, for "*unlawful fishing*" in the Potomac river; on his trial he asked the following instruction "If the jury believe from the evidence that the defendant is a *bona fide* citizen of the State of Maryland, and that the offence in the indictment charged was committed on the waters of the Potomac river, they shall find the defendant not guilty." The instruction was refused, Hendricks excepted, and appeal was taken to the Supreme Court of Appeals of Virginia.

That court held Virginia's jurisdiction was concurrent with that of Maryland over the Potomac river from shore to shore. *Anderson, J.*, said: "The effect of this article [*the eighth in the compact*] is to give to the State of Virginia concurrent jurisdiction with the State of Maryland over the Potomac river from shore to shore, and over that part of Pocomoke river which is within the limits of Virginia; to enact such laws, with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters."

There was no question in the case concerning *Pocomoke river*. The language of "the eighth section" of the compact is not quoted by the learned judge, and so much of the decision as relates to Pocomoke river *obiter dicta*, and therefore not binding as a decision.

In the pointed and striking words of *Mr. J. Nevett Steele*, Maryland's honored son and distinguished lawyer, in his splendid exposition of this "compact": "If we assume this liberal construction of the eighth clause to be established by this case, then the right of the State of Maryland to participate in the legislation for preserving fish in that part of the Pocomoke river within the State of Virginia would furnish some ground for an inference that the compact meant that citizens of Maryland should have the right to participate in fishing in that part of the river.

"But such an inference is met and, I think, overcome by the fact that although the subject of the right of fishing was a matter to which the attention of the framers of the compact was directed, yet no stipulation as to a joint right of fishing in the Pocomoke was inserted.

"If they meant to secure such a right to the two States they would have inserted a provision to that effect, as in the case of the Potomac river."

In no clause of the "compact" is *Pocomoke Sound* mentioned; in it no stipulation, agreement, covenant or contract which relates to or names this body of water; no stipulation for the Pocomoke like that made for the Potomac river, and there being none, there can be no such right.

For more than a century Virginia, by her acts, and Maryland, by non-action, have practically refuted the claims set up in Wharton's and Nelson's pleas and put upon "the compact of 1785" the interpretation it should receive from every unprejudiced mind—that given by *J. Nevett Steele* and by the circuit court—namely: That there is nothing in the compact, or properly to be deduced from it, which gives to the citizens of Maryland right to fish in Pocomoke river or Pocomoke sound.

Virginia's laws bind *even Marylanders* ,and must be obeyed. Wharton and Nelson have violated these laws and been convicted. The court had jurisdiction over them; its judgments must stand; the Circuit Court for the Eastern District of Virginia be affirmed; Wharton and Nelson placed in the custody of Wise, sheriff, etc., and thereafter dealt with according to the laws of Virginia.

The *four* grounds of error are unsupported by law or fact and without merit.

R. TAYLOR SCOTT,
Attorney-General of Virginia,
For Wise, Sheriff, etc.

RICHMOND, VA., *February 21, 1894.*

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153-155

In the Supreme Court of the United States.

Ex Parte Robert L. Wharton
and
Severn Nelson.

On Petition for Writ of
Habeas Corpus.

APPEAL FROM CIRCUIT COURT OF UNITED STATES,
EASTERN DISTRICT OF VIRGINIA.

Brief of James H. Fletcher, Jr., Commonwealth's Attorney of Accomack County, Va., for Wise, Sheriff, &c.

In the Supreme Court of the United States.

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APPEAL FROM CIRCUIT COURT OF UNITED STATES, EASTERN DISTRICT OF VIRGINIA.

Brief of James H. Fletcher, Jr., Commonwealth's Attorney of Accomack County, Va., for Wise, Sheriff, &c.

Robert L. Wharton and Severn Nelson were indicted in the County Court of Accomack county, in the State of Virginia, at the March term of said court, A. D. 1893, for that, being non-residents of the State of Virginia, they did unlawfully take and catch oysters in the waters of said State, and within the jurisdiction of said county—to-wit, on Ledge Rock, in Pocomoke sound—against the peace and dignity of the Commonwealth of Virginia. They were indicted and tried separately, but the language is the same in both indictments, and the proceedings in both trials the same, and therefore they will be considered as if there was only one indictment.

At the April term of said court, A. D. 1893, the said Wharton and Nelson were tried upon said indictment, found guilty by the jury, and sentenced by the court to pay a fine of five hundred dollars, the fine prescribed by law for said offence, and the costs of prosecution: and be committed to jail until said fine and costs should be paid, or they be otherwise discharged by due course of law.

At the trial the defendants filed a special plea to the jurisdiction of the court, alleging that, at the time the alleged offence was committed, they were citizens of Maryland; that the act of Assembly of Virginia, under which the indictment was found, had not been adopted or ratified by the General Assembly of Maryland; and that, by the Compact of 1785 between Virginia and Maryland, the said court had no jurisdiction to try the defendants for the alleged offence, the Pocomoke sound mentioned in the indictment being a part of Pocomoke river, referred to in the Compact. This plea was demurred to by the Commonwealth, and the demurrer sustained by the court; and then, upon the plea of "not guilty," the jury found them guilty, as above stated. Then the court, refusing to set aside the verdict on the motion of the defendants, because, as they alleged, it was contrary to the law and the evidence, and that the court erred in sustaining the demurrer to the special plea, passed sentence as above stated. Whereupon the defendants, alleging that they intended to apply to the Circuit Court of said county of Accomack for a writ of error, moved the court to *admit them to bail*, pending their appeal, to appear and abide by said judgment; which motion was refused by the court, as the law did not provide for admitting a person to bail after conviction. And thereupon the defendants were committed to jail.

The defendants thereupon applied to the judge of the Circuit Court of the United States for the Fourth Circuit, sitting as in the Eastern District of Virginia, to grant to them the writ of *habeas corpus*, directed to John H. Wise, sheriff of said county of Accomack, by whom, by virtue of said judgment, they were imprisoned and deprived of their liberty, alleging that their imprisonment was unlawful for the following reasons:

1st. That the Compact of 1785, between Virginia and Maryland, is still a subsisting agreement, binding upon and enforceable by each of these States and the citizens thereof, according to its true interpretation.

2d. That, by its true interpretation, the citizens of Maryland now possess and are entitled to enjoy freely a right of fishery, including the right to take oysters, in common with the citizens of Virginia, in the Pocomoke river.

3d. That the Pocomoke river, as mentioned in the Compact of 1785, embraces what is now commonly called Pocomoke sound, which is nothing but the mouth of Pocomoke river.

4th. That inasmuch as the law of Virginia, under which the petitioners were arrested, indicted and convicted, was never adopted and enacted by concurrent legislation of Maryland, it was and is inoperative as against citizens of Maryland; and that, therefore, the conviction thereunder of the petitioners, who were and are *bona fide* citizens of Maryland, was void.

5th. That assuming, but not conceding, that the law of Virginia in question is not inoperative as against citizens of Maryland, still, under the tenth section of the Compact of 1785, the petitioners, as citizens of Maryland, could not lawfully be tried in the courts of Virginia, but were entitled to be tried in the courts of Maryland; and that, therefore, their trial and conviction in Accomack County Court were and are void.

6th. That, being thus unlawfully deprived of their liberty by the judgment of a court which had no jurisdiction to try them, and being unable in any other mode to obtain a proper hearing of their case and a release from such void judgment, the United States Circuit Court, in this proceeding, has ample jurisdiction to order their discharge; and, upon the case made, should exercise such jurisdiction, and direct their immediate release.

The writ was issued as prayed for, and made returnable before the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk, on the 11th day of May, 1893, at 12 o'clock M. On said 11th day of May the said Circuit Court ordered the return of the writ to be set for hearing in Richmond, on June 1st, 1893, at 12 o'clock M.; and that the petitioners be admitted to bail in the sum of one thousand dollars each, for their appearance at said time and place. At the said June term of the said court the cases were argued at Richmond, and at the following term the said court rendered its decision that the petitions of the prisoners be disallowed, and that they be remanded to the custody of the sheriff of Accomack county. From this decision the petitioners have appealed to this court.

The statute of Virginia, for the violation of which the petitioners were prosecuted, is in the Acts of Assembly of Virginia, session of 1891–'92, p. 603, and reads as follows: "If any person, other than a resident of this State, take or catch oysters or other shell fish in any of the waters of the State, he shall, upon conviction thereof, be fined five hundred dollars."

It is contended on the part of the petitioners that this act of Assembly, so far as it prohibits citizens of Maryland from taking oysters in Pocomoke sound, is null and void, because, by sections seven and eight of the Compact of 1785, between the two States, citizens of Maryland have equal rights with citizens of Virginia to take oysters in these waters, and because, further, such legislation must be concurred in by the Legislature of Maryland.

It is conceded on the part of Virginia that the said Compact is still a subsisting agreement, binding upon each of these States and the citizens thereof; but it is respectfully submitted that the said sections are not susceptible of the construction endeavored to be placed upon them by the petitioners. The seventh section of the Compact reads as follows:

"The citizens of each State, respectively, shall have full property in the shores of Potowmack river, adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by the citizens of both States: *Provided*, that such common right be not exercised by the citizens of the one State to the hinderance or disturbance of the fisheries on the shores of the other State; and that the citizens of neither State shall have a right to fish with nets or seines on the shores of the other."

Is there anything in this section by which a common right of fishery is given, either expressly or impliedly, to citizens of Maryland in the Pocomoke river, or Pocomoke sound? On the contrary, Pocomoke river or sound, is nowhere mentioned in the section. The "Potowmack river" alone is named; and the petitioners, in order to claim that a common right of fishery in the Pocomoke river is given to citizens of Maryland by this section, *must simply insert what is not there.* It will not do for them to say that this was *intended* by the framers of the Compact, or that it was *just* and *right* that this privilege should have been granted by Virginia. Our reply is that it was *not* granted. It may have been that this privilege was asked for by the Maryland commissioners at the time the provisions of the Compact were under consideration at Mt. Vernon, and refused by the Virginia commissioners, as no record of their deliberation has been preserved—at least so far as we have been able to ascertain; or, it may have been—and we consider this more probable—that the subject was not considered at all by the commissioners, whether the term is applied to what is at present known as "Pocomoke river," or to the waters at present known as "Pocomoke sound," and for the following reasons:

1st. By a reference to the resolutions passed by the Legislatures of Virginia and Maryland, appointing the commissioners crossed the river), whereas Maryland owned both banks of this river to the north of this line, and also the upper part of Chesapeake bay.

2d. The fisheries in the Pocomoke *river* were not, at the date of the Compact, nor are they now, of any importance, whether shell fish or floating fish. The floating fisheries consist of a few shad, caught in the spring with bow-nets, and some perch and catfish caught along the banks in the summer with a hook and line. It is a very deep river, strong current, with marshy and muddy shores. The floating-fish industry in the waters known as "Pocomoke sound" was undoubtedly not a matter of much importance in 1785, and there is no contention in regard to that at this time; and the shell-fish industry in the waters of Pocomoke sound was so little considered by the people of this State (we presume because at that time there were plenty of oysters for all, and the industry undeveloped,) that there was no law on the Virginia statute-books prohibiting oysters from being taken by any person, whether a resident or non-resident, in any manner, or in any season, until upwards of thirty-five years after the date of the Compact. This is in strong contrast to the important fisheries in the Potomac existing at the date of the Compact. The shad and herring fisheries were of great value, and the commissioners, having the navigation of and jurisdiction over the river under consideration, it being doubtful as to the territorial jurisdiction on the river, naturally directed their attention to the rights of the citizens of each State to *fish* in the river, and settled the same by the seventh section of the Compact, the language of which is applicable only to floating fish, for "fish with nets" can only apply to such; although it is now conceded that the term "fish" includes oysters. There were plenty of oysters unquestionably in the Potomac river at that time, but they were evidently not in the minds of the commissioners when they framed the seventh section of the Compact, presumably for the reason that the industry had not developed to any considerable extent. It is not, however, the right of fishery in the Pocomoke *river* that is sought to be obtained by this controversy, nor is it the right to catch floating fish in Pocomoke sound; it is to obtain the right to take *oysters* from the twenty-eight thousand five hundred acres of natural oyster-rocks in Pocomoke sound, and within Virginia's territory. For the last ten years Virginia has, by prohibitory statutes and by the maintenance of an expensive police force to see that the statutes are obeyed, protected all the natural rocks in this sound from being dredged, or scraped, or worked on in any manner, except with ordinary oyster tongs, and from being taken in certain seasons, until now the rocks are well seeded with oysters. Virginia has taken care of and cultivated the crop, and our sister State would step in now and reap the harvest.

3d. It is further submitted as a reason why the attention of the framers of the Compact was not directed to the fisheries in Pocomoke river, the two rivers did not stand in the same relation to the two States. For over one hundred miles Virginia owned one bank of the Potomac and Maryland the other, and the territorial limits and jurisdiction of the two States over said river were then unsettled and in controversy (although the bed of the river is now decided to belong to Maryland), and therefore it was to be expected that the two States should consent that the citizens thereof should have a common right of fishery in its waters. But such was not the case in regard to the Pocomoke river. The Calvert and Scarborough line, which was the line between the two States at the date of the Compact, was "an east line agreeable with the extremest part of the westermost angle of the said Watkins point, *over Pocomoke river*, to the land near Robert Holston's, and there have marked certain trees which are so continued by an east line running over Swanseacute creek into the marsh of the seaside, with apparent marks and boundaries, which, by our mutual agreement, according to the qualifications aforesaid, are to be received as the bounds of Virginia and Maryland on the eastern shore of Chesapeake bay." The line was thus a right line, running east and west, *over* the Pocomoke river. The general course of the river is northeast and southwest, and consequently no part of it could possibly have been a boundary. This line crossed the river at a point five miles, or upwards, north of its mouth, and there existed, at the time of the Black and Jenkins award, about thirty marks on the line from the river to the ocean. There was no occasion, therefore, for any agreement between the States for a common right of fishery in the Pocomoke, as there was in the case of the Potomac, and consequently none was given. On the Potomac Maryland owned one bank and Virginia the other; whereas in the case of the Pocomoke, north of the line between the States Maryland owned both banks, and south of the line Virginia owned both banks.

The Maryland boundary commissioners, in 1872, who examined the boundary matter very thoroughly, and were stating the Maryland case as strongly as possible, say, on p. 68 of their statement of the case: "It is remarkable, too, that in the Compact of 1785, while conceding that the right of fishing in the Potomac river shall be common to and equally enjoyed by the citizens of both States, Maryland omitted to secure, by express terms, reciprocal rights in the Pocomoke river"; and, in their offer of a compromise, on p. 69, they suggested that "the right of fishing and taking oysters in Pocomoke *bay and river* to be common to the citizens of both States, subject to concurrent regulations by the two States." (See "Report and Accompanying Documents of the Virginia Commissioners," &c.) They would hardly have made this admission, and this offer of compromise, if they had even thought Maryland already possessed these rights.

We have thus endeavored to show that the *probabilities* were that the right of fishery, whether in Pocomoke river or

Pocomoke sound, was not considered at all by the framers of the Compact of 1785; but, whether considered or not, there certainly was no common right of fishery given in these waters by the seventh section of the Compact. To use the language of the late I. Nevett Steele, one of Maryland's ablest jurists, in an opinion submitted in 1885 to the then Executive of Maryland, Governor Lloyd, after a full and exhaustive investigation of this subject, this seventh section "contains no stipulations such as that in the case of the Potomac river, that the citizens of both States shall have the right of fishing in the Pocomoke river, *and, there being no such stipulation, there is no such right.*"

THE EIGHTH SECTION OF COMPACT.

It is contended on the part of the petitioners that the eighth section of the Compact provides that all laws and regulations which may be necessary for the *preservation of fish in the Pocomoke river* must be made with the mutual consent and approbation of both States. It is submitted, however, that this section is capable of no such construction. It reads as follows:

"All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States."

Its object is evidently to state what laws and regulations shall be made with the mutual consent and approbation of both States; and they are—

1st. Such as may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potomac.

2d. Such as may be necessary for preserving and keeping open the channel and navigation of the river Potomac, by preventing the throwing out ballast, or giving any other obstruction thereto; and—

3d. Such as may be necessary for preserving and keeping open the channel and navigation of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto.

It is submitted that this is the only grammatical construction of this section. If these three clauses—namely, the preservation of fish, the performance of quarantine, and the preserving and keeping open the channel and navigation—applied alike to both rivers, as is contended, would not the section be written differently, by bringing the two rivers together, either after the word "fish," or word "quarantine," or word "navigation"? If the meaning contended for was intended to be conveyed, is it not *indispensable* to put the two rivers together? What other object could there possibly have been for separating them, except to separate and distinguish between the clauses applicable to each? By putting the first two clauses before "Potowmack," and the third before "Potowmack" and "Pocomoke," show that the first two apply exclusively to the "Potowmack," and the last one to both "Potowmack" and "Pocomoke."

Aside from the grammatical construction of this eighth section, is it *probable* or *likely* that the framers of the Compact would have provided that all laws and regulations necessary for the preservation of fish, or for the performance of quarantine in the river *Pocomoke*, should be made with the mutual consent and approbation of both States? What reason existed for such a provision? A common right of fishery had been given expressly by the seventh section to citizens of both States in the river Potomac, and, therefore, a provision for the enactment of mutual laws for the preservation of fish in that river is to be expected; but no such common right was given in the Pocomoke, and, therefore, no occasion for mutual laws in regard to that. But, on the other hand, Maryland was very much interested in keeping open the channel and navigation of the Pocomoke, for, as has been before stated, Virginia, under the Calvert and Scarborough line, owned both banks for upwards of five miles above its mouth ; and, in the absence of any compact between the States in reference to keeping open the channel, Virginia would have had the power to prevent Maryland vessels from passing out the river, which is navigable for upwards of twenty miles in Maryland territory above the line between the States. We again take the liberty of referring to the opinion of Maryland's able attorney and adviser of the State. He says: "The ordinary and grammatical construction of this sentence [eighth section of the Compact] would manifestly limit the mutual and joint legislation over the river Pocomoke to 'the preserving and keeping open the channel and navigation,' and would not extend to the 'preservation of fish' in that river. If this construction be correct, and, in my judgment, it is, there is nothing at all in the Compact on the subject of fish in the Pocomoke, and consequently nothing upon which any claim of Marylanders to fish there could be founded. The Compact having, by its previous clauses, given to Marylanders no right to fish in that part of the Pocomoke river belonging to Virginia, there seems to be no reason why it should give to Maryland the power to legislate for the preservation of fish in that part of the river."

In order further to support our construction of these two sections of the Compact, we refer to the fact that there never has been any joint legislation by the two States in regard to fishing in Pocomoke river (or sound), as in regard to the Potomac.

It is further contended on the part of the petitioners that the Court of Appeals of Virginia, in the case of *Hendricks v. Commonwealth*, 75 Va. 934, settled by adjudication the concurrent right of the citizens of Maryland to fish in the Pocomoke river. It is submitted, however, that no question arose in that case requiring an adjudication of any right of fishery in the Pocomoke river: and so much of the opinion as relates to a right of fishery in said river is merely an *obiter dictum*, and would in all probability be so considered if the question should ever again be brought before that tribunal. This was unquestionably the opinion of the petitioners, or else they would have carried their case to that court. We will submit just here that the claim set up by the petitioners that they were unable to procure a review of the decision of Accomack County Court by the Supreme Court of Appeals of Virginia, unless they either paid the fine of five hundred dollars assessed upon them, or suffer confinement in the county jail, and thus were *forced* to go into the United States Court by a writ of *habeas corpus*, is entirely unfounded in fact or law. If this were true, it were a gross reflection upon the jurisprudence of Virginia. The right of appeal to the Supreme Court, given to every man convicted of crime, would be an empty right, and a mockery in all cases when the conviction carried with it a sentence of imprisonment. It is true that the County Court refused to admit the petitioners *to bail* pending their application to the Circuit Court for said county for a writ of error, on the ground that "the law does not provide for admitting a person to *bail* after being convicted"; but the petitioners had a remedy which would have answered the same purpose as bail, and which is taken advantage of every day by persons who desire to have their cases reviewed by a higher court, but of which the petitioners deliberately refused to avail themselves, even though their attention was called to it by the County Court. An ample remedy is provided in section 4051 of the Code of Virginia, the latter part of which reads as follows: "In any other criminal case [all except where person is sentenced to death or confinement in penitentiary] wherein judgment is given by any court, and in any case of judgment for a contempt, to which a writ of error lies, the court giving such judgment may *postpone the execu-*

tion for such time and on such terms as it deems proper." In the cases of the petitioners the County Court offered to postpone the execution of the judgment for whatever reasonable time they might desire, if they wished to apply to the Circuit Court for a writ of error, upon their execution of a bond, conditioned according to law, with satisfactory security. This offer they refused to accept, preferring to stand on their technical application for *bail;* and, upon the court sending them to jail in default of the payment of the fine and costs, as they knew it was compelled to do under the law, they remained there until they could sue out their writ of *habeas corpus.*

It is not fair to the court of Accomack county, which tried them, nor to the laws of Virginia, for the petitioners to allege "that, in order to obtain their liberty, it would be necessary for them to pay said fine of five hundred dollars and costs, and, in default of said payment, under the law of Virginia, they will be imprisoned for six months, and so they show to your Honor that, if they desire to obtain their freedom, they can only do so under and by virtue of a writ of *habeas corpus,* which they now ask of your Honor to test the validity of their said sentence and imprisonment, for the obvious reason that before their cases can be heard by the Supreme Court of Appeals of Virginia they will have served out the said term of imprisonment of six months imposed by the law of Virginia in default of a payment of their said fines." In fact, they were not sent to jail for six months in default of the payment of the fine, nor is there any such law in Virginia. They were sentenced to jail *until* they should pay their fine and costs, or be otherwise discharged by due course of law. The fact was the petitioners were unwilling to submit their case to the decision of the Virginia Court of Appeals, although they quote with so much confidence the decision above referred to of *Hendricks v. Commonwealth.*

The questions actually raised and decided in that case were—

1st. That a citizen of Maryland was liable to prosecution and conviction in a Virginia court, notwithstanding article ten of the Compact of 1785, for the violation of a statute of Virginia relating to fishing in the Potomac river, which statute was enacted with the consent and approbation of the State of Maryland.

2d. That a demurrer to an indictment containing two counts, being general, and not to each count thereof, if either count is good, it is properly overruled. Section 10 of the Compact was expressly construed by the court in that case, and its construction of this section will be referred to later on when we come to consider the question of jurisdiction.

It is further claimed by the petitioners that the Legislature of Virginia, by an unbroken series of acts, beginning with 1819, has conceded to Maryland in both rivers the same oyster rights as Virginians. It is true that an act was passed by the Virginia Legislature in 1819, prohibiting any person, who was not a citizen and resident of the State, from taking oysters in any of the waters thereof, except from the waters of the Potomac and Pocomoke, where those rivers are common territory to the States of Maryland and Virginia. Also, in 1831, an act was passed which forbade all except actual inhabitants and residents of Virginia from taking oysters in the waters of Virginia, except in such rivers, and such portions thereof, as are common property to this and some other State. Also, in 1846, an act was passed forbidding all persons, other than actual residents and inhabitants of Virginia, from taking oysters in the waters of Accomack county, except in such rivers and portions thereof as are common to Virginia and other States. But, suppose the courts had been called upon to construe the language used in these statutes—namely, "where the rivers are common territory"—they could very well, and would, in all probability, have said that there was no "common territory" in Pocomoke river. The Calvert and Scarborough line, which, wherever it might run, was the only existing line at the date of these statutes, was "an east line agreeable with the extremest part of the westermost angle of said Watkins point, *over* Pocomoke river, to the land near Rob't Holston's, &c." The line thus ran, not up nor on the shores of the Pocomoke *river* or *sound*, but "*over* Pocomoke *river*." The line did not run "along" the right bank of the river, and at a certain point run "across" the river, but it was run "*over*" the river, signifying that in this instance it was moving *from* the west and over the river to a place beyond the left or east bank of the river near Robert Holston's.

Therefore, according to this line, no part of the river could possibly have been "common territory" to both States. Probably if the attention of the Legislature had been called to this point, they would never have used such language; but there was no occasion for the question to arise, for the language of the acts could do Virginia no harm, as there were no oysters in the Pocomoke river for anybody to take.

The first act passed by Virginia relative to Pocomoke sound was in 1852, and prohibited all non-residents from taking oysters within the waters of this State; and authorized the arrests of non-residents, *without warrants*, if found taking oysters within the waters of Virginia. And, to show what errors the Legislature may be capable of committing, an act was passed in 1867 forbidding any person, other than a resident of Virginia, to take oysters either in the Pocomoke or *Potomac* rivers. It may fairly be presumed that Maryland would not have been slow to claim that this act was void as to citizens of Maryland, as being contrary to the express provisions of the seventh section of the Compact. In the year 1870 numerous captures were made by the Virginia oyster police force of citizens of Maryland for taking oysters in Tangier and Pocomoke sounds. The captured parties were defended by eminent Maryland counsel, but were committed for final trial, and the vessels used by them in violating the law were held for confiscation. On Oct. 24th, 1870, a message was sent by the Governor of Virginia to the Legislature, announcing that the Governor of Maryland had pledged his State to the observance and maintenance of the temporary line agreed upon by the police commanders of the respective States, and asked for the release of the Marylanders. Whereupon the Legislature passed the following joint resolution:

"*Resolved*, That the Governor of Virginia be authorized to discharge from arrest the citizens of Maryland who were arrested for violation of the laws of Virginia, in trespassing upon her territory and gathering oysters within her boundaries, and to release the vessels seized."

Thereupon the arrested parties were discharged from custody and the captured property restored. The temporary line above referred to, as agreed upon by the police commanders of the respective States, and to the observance and maintenance of which the Governor of Maryland pledged his State, was a line across Tangier sound only. The right to the whole of Pocomoke sound was claimed as belonging to Virginia by her police commander, Capt. Orris A. Browne. (See in the records the affidavit of said Browne.) Why should the Governor of Maryland have thus pledged his State to the observance of a temporary line, if the citizens of Maryland had a right to take oysters in the entire sound under the Compact? Was not this a recognition on the part of the State of Maryland that her citizens did not claim the right to take oysters in these waters by virtue of the Compact of 1785; but by reason of the supposition that a portion of these waters were within her territorial limits; that a settlement of the line would settle where her citizens would have the right to take oysters?

It is argued by the petitioners that the Virginia Legislature, in its earlier acts, above referred to, must have meant Pocomoke bay or sound when Pocomoke river is spoken of, because there were no oysters in the Pocomoke river; but to show that no such inference can be drawn, the Virginia Legislature, on April 18th, 1874, passed an act relative to oysters, section 22 of which reads as follows: "If any person (other than a citizen of this State) shall take or catch oysters or other shell fish in any manner, or plant oysters in the waters thereof, or in the rivers Potomac or Pocomoke, he shall forfeit, &c." But this section shall not extend to citizens of Maryland taking oysters in the said mentioned rivers. Under this section several citizens of Maryland were arrested for taking oysters in Pocomoke sound, and were tried and convicted in the County Court of Accomack. At the next session of the Legislature, on February 3d, 1875, an act was passed, in the preamble to which it was recited that the Governor, in his annual message, had asked that the true meaning and construction of section 22 of the act of April 18th, 1874, should be declared; and that he had communicated the correspondence between him and the Governor of Maryland, in which the latter proposed that a temporary line of division between the two States, pending the decision of the arbitrators as to the true boundary-line of the States, should be established; which act enacted:

"1st. That the true meaning of the said 22d section of the said act was to confer upon citizens of Maryland the privilege of taking oysters in the Potomac and Pocomoke rivers, and not in Pocomoke bay or sound.

"2d. That insisting and declaring that the true line between this State and the State of Maryland, east of the Chesapeake bay, is the line known as the Calvert and Scarborough line, and that a part of the county of Somerset, claimed by the State of Maryland, is south of that line, and of right part of the territory of Virginia; yet, in a spirit of comity and good will to a sister State, be it further enacted that the privilege of taking oysters in Pocomoke bay shall be enjoyed by citizens of Maryland in common with the citizens of Virginia, north of a right line running from Cedar

Straights to the intersection of the Calvert and Scarborough line with the Pocomoke river.

"3d. The privilege conferred by this act may be withheld at the pleasure of the General Assembly."

It is very important to note that the courts here held that the privilege to take oysters in Pocomoke *river*, given to citizens of Maryland by the act of April 18th, 1874, did not protect them from a prosecution and conviction for the offence of taking oysters in Pocomoke sound; and, also, the Virginia Legislature said that when they legislated in reference to Pocomoke river they did not mean Pocomoke bay or sound; and here, for the first time, was the privilege given to Maryland citizens to take oysters in Pocomoke bay or sound, and it was given expressly "in a spirit of comity and good will to a sister State," and might "be withheld at the pleasure of the General Assembly."

From an examination of this whole legislation, is any recognition found on the part of Virginia, or an assertion by Maryland, of the right of the citizens of Maryland, under the Compact of 1785, to take oysters in Pocomoke sound within the limits of Virginia? But even if the Virginia Legislature had passed acts permitting citizens of Maryland to take oysters in Pocomoke sound, these acts would have been revocable at the pleasure of the Legislature, and their only effect would have been to bar a prosecution of Maryland citizens (until the acts were repealed) for taking oysters in said waters. The Legislature has no authority to take away such rights from its own citizens and confer them upon citizens of another State. We submit that the passing of such a right is in the nature of a compact or agreement, and which, by the Constitution, would have to be ratified by Congress. We presume, however, that the petitioners do not claim this common right of fishery in Pocomoke sound by virtue of this legislation on the part of Virginia, but only that this legislation tends to show that Virginia recognized that Maryland possessed this common right under the Compact of 1785; but we do not believe that this legislation is capable of such construction. It is a fact worthy of particular notice that in every act passed by the Virginia Legislature, from the Code of 1849 up to the present Code of 1887, regulating in any manner the taking of fish or oysters in the *Potomac* river, some such clause as the following concluded the act: "This act shall be in force as soon as Maryland shall have given its assent thereto or adopted its provisions"; whereas no such language was ever used in legislation regulating the taking of oysters or fish in *Pocomoke* river or sound. Can anything show more plainly than this that Virginia did not consider that legislation in reference to Pocomoke river or sound had to be concurred in by the Legislature of Maryland?

It is claimed further by the petitioners that Virginia never asserted her rights in Pocomoke sound, but has always, until comparatively recent years, permitted citizens of Maryland to take oysters in these waters unmolested.

We will say in reference to this that prior to about 1870 Virginia had no oyster police force, but was dependent entirely upon the usual county authorities to enforce her oyster laws; and experience has shown that it is almost impossible to prevent citizens of Maryland from crossing over into Virginia waters and depredating upon her oyster rocks, even with a police boat constantly on the lookout. This has been shown in reference to Tangier sound, where no one questions Virginia's exclusive right to take oysters on her side of the line; and yet Virginia is compelled to keep one of her oyster police boats stationed just on the line to keep citizens of Maryland from dredging on her oyster rocks, and they can only be driven off at the mouth of the cannon.

Is it any wonder, then, that the county authorities were unable to prevent citizens of Maryland from trespassing upon Virginia territory? When the oyster police force came into existence, about 1870, the Virginia commander, as has been previously mentioned, prohibited citizens of Maryland from taking oysters anywhere in Pocomoke sound, claiming that the entire sound was Virginia territory. Afterwards, in 1875, citizens of Maryland were permitted, by an act of the Virginia Legislature, but only from "a spirit of comity and good will to a sister State," to take oysters in a portion of Pocomoke sound; and also, in 1882, an act was passed by which all of that part of Pocomoke sound lying within the jurisdiction of Maryland, as ascertained by the Black and Jenkins line, and a small portion of Pocomoke sound lying within Virginia, were made common territory to citizens of both States for catching and taking fish and oysters; but this act was repealed at the very next session of the Legislature, and since then Virginia has not given to Maryland citizens any rights in Pocomoke sound within her limits as fixed by the Black and Jenkins line, and has endeavored, by her police force, to keep all non-residents out of said waters. If a right had previously existed in the citizens of Maryland to take oysters in the whole of Pocomoke sound, was it probable that she would have been willing to accept and acquiesce in the assignment to her of the privilege of oystering in so small a portion of the sound?

In order to sustain their position the petitioners were compelled to take upon themselves the burden of proving that the Pocomoke river mentioned in the Compact embraces the waters now known as Pocomoke sound. If we are right in our contention that no common right of fishery was given by the seventh section to citizens of Maryland in Pocomoke river, and that no joint legislation was required as to Pocomoke river by the eighth section, except for preserving and keeping open the channel and navigation thereof, it is wholly unnecessary to argue the point as to whether or not the framers of the Compact meant to include Pocomoke sound when they spoke of Pocomoke river; but, as the petitioners have discussed this question quite extensively, we will refer to it, although briefly.

The Pocomoke sound is evidently only an arm of the Chesapeake bay, and we believe that it was so considered by the framers of the Compact, just as they undoubtedly considered Tangier sound an arm of the Chesapeake bay. The body of water now known as Pocomoke sound answers the definition of a sound, which is a narrow or shallow *sea*, and is, in fact, not distinguishable from a bay, and it was often called *Pocomoke bay* on old maps and in old grants; whereas Pocomoke river answers the definition of a river, and can hardly be confounded with a sound or bay. It will be seen by an examination of any chart of Pocomoke river and Pocomoke sound that they are distinct and dissimilar bodies of water. The river is a deep, bold stream, with continuous banks on each side, of an average width of about one hundred and twenty-five yards, and navigable as far up as Snow Hill, Worcester county, Maryland. The river at its mouth is probably two hundred yards in width, and after passing out its mouth you suddenly emerge into a body of water that varies in width from about three miles, at the mouth of the river, to about six miles, at Watts Island, which is upwards of twenty miles from the mouth of the river. This is the body of water that is known as Pocomoke sound or Pocomoke bay. For about five miles from the mouth of the river down the sound the water is very shallow, on account of the large deposit of mud brought down the river out of the swamps. Vessels and steamboats have considerable difficulty in passing over this mud, particularly when they happen to strike there at low tide. After you get some distance down the sound the Maryland shore is broken into a number of small islands, beginning at "Fox's Island" and ending at "Little Watts Island," where the sound unites with the Chesapeake bay. We assert that it cannot be shown that this body of water was ever known as Pocomoke river. The old maps plainly show it—on some of which it is called "Pocomoke bay"—one as ancient as 1670; on others it has no name, but on none of them is it marked "Pocomoke river." This body of water is referred to as a "bay" in a document taken from the Maryland Council Proceedings, Liber H. H., folio 268, and is a commission, dated August 22d, 1666, directed to certain persons, to lay off the county of Somerset, bounded on the south by a line drawn from Watkins Point, being the north point of that *bay* into which the river Wighco (formerly called Wicocomaco, and afterwards "Pocomoke," and now Wicocomaco again,) doth fall. What "bay" could this have been unless it was the Pocomoke bay?

Again, in a grant by Maryland of Bay Bush Hall, in Somerset county, to John Hill, dated April 6th, 1682, "Pocomoke bay" is named as one of the boundaries. Also, in an extract from the rent-roll for the said tract of Bay Bush Hall, "Pocomoke bay" is mentioned. (See record of petitioners.)

In several ancient grants on the part of Virginia this body of water is called "Pocomoke bay." Also, in the report of Edmund Scarborough and Philip Calvert, which bears date June 25th, 1668, fixing the line between the two States (then colonies), "Pocomoke bay" and "Pocomoke river" are both spoken of as two distinct bodies of water, and it is fair to presume that the eminent men that framed the Compact, in 1785, were as familiar with these waters, and the difference between the sound and the river, as the brother of Lord Baltimore and the Surveyor-General of Virginia.

As to the contention of the petitioners that they had the right to be tried in the courts of Maryland.

This contention is based upon the tenth section of the Compact of 1785. This section provides that all piracies, crimes, and offences committed on that part of Pocomoke river within the limits of Virginia, or where the line of division between the two States upon the said river is doubtful, by any citizen of the Commonwealth of Virginia or of the State of Maryland, either against the other, shall be tried in the court of that State of which the offender is a citizen. In order to come under the provisions of this section the piracy, crime, or offence must have been committed either in "Pocomoke river" or where the line of division upon the said river is doubtful. The offence is charged in the indictment as having been committed in "Pocomoke sound," which, although known as "Pocomoke bay," we have endeavored to show is a separate and distinct body of water from Pocomoke river; and, if we are right in this, the petitioners cannot claim the benefit of this section, as the localities are not the same. The line of division is nowhere doubtful, having been distinctly designated by Black and Jenkins in their award made in 1877, and afterwards marked by surveyors. But assuming that the "Pocomoke sound" mentioned in the Compact embraces the waters now known as "Pocomoke sound," still Maryland cannot claim jurisdiction in this case, for the piracies, crimes, and offences named in the Compact are expressly limited to such as are committed by a citizen against a citizen, and not by a citizen against the Commonwealth. The construction sought to be given to this section by the petitioners totally ignores this limitation. The act charged in the indictment is one committed peculiarly against the *Commonwealth*—namely, the taking and catching oysters from the natural rocks of the State—and no one can well say that it is an offence committed "by a citizen of Maryland against a citizen of Virginia." The property trespassed upon is the property of the *State;* it never has been granted by the State to any individual, nor appropriated by any individual.

This point was directly raised and passed upon by the Supreme Court of Appeals of Virginia in the case above referred to of *Hendricks* v. *Commonwealth.* The court in that case distinctly held that the tenth section only applied to offences committed by a citizen against a citizen, and not by a citizen against the State. In that case the indictment was against George Hendricks, proven to be a citizen of Maryland, and contained two counts. The first charged that between the 1st day of March and the 1st day of June, 1880—viz., on the 17th day of May, 1880—within the waters, bounds, and berth of a regularly hauled fishing landing upon the Potomac river, in the county of Fairfax, without the permission either of the owners or occupier of the said fishing landing, he, the said George Hendricks, a certain seine and gill net, which he then and there had, did unlawfully haul, drift, and fish, contrary to the act of the General Assembly in such case made and provided by the mutual consent of the States of Maryland and Virginia. The second count charged that the said George Hendricks, on the 17th day of May, 1880, upon and in the Potomac river, and opposite the shore of the river in the said county of Fairfax, with a certain gill net and seine, other than such as may be laid out and hauled to and landed upon the shores of said river, did unlawfully fish, contrary to the act of the General Assembly of Virginia, &c., as in the first count. Here two distinct offences are charged. The first count is founded on § 18, ch. 100, of the Virginia Code of 1873, and the second count upon the 20th section of said chapter. It was insisted that Hendricks, being a citizen of Maryland, could only be tried by a court of Maryland. The court held that it was questionable whether the prosecution under the first count was for an offence *against a citizen*; but that the offence charged in the second count "involved no violation of private right, but was purely on offence against the State, and unquestionably did not fall within the restriction as to jurisdiction contained in article 10 of the Compact." The offence charged against the petitioners—namely, the taking of oysters from the natural oyster rocks of the State—is certainly as much an offence against the State as the act charged against Hendricks in the second count of his indictment.

But further, if the petitioners are right in their contention that the words "piracies, crimes, and offences," in the 10th article of the Compact, are used in their broadest sense, and without any limitation, it virtually amounts to a license on the part of Marylanders to take oysters, in any manner and at any time they choose, not only in Pocomoke sound, (which they claim is embraced in Pocomoke river), but also in any part of the Chesapeake bay, from the mouth of the Potomac and Smith's Island to Cape Charles and Cape Henry. For, suppose they are sent to the Maryland courts to be tried for the offence with which they stand charged, in what court in Maryland would they have their trial? But even if there existed a particular court to which they would have to be remanded, still they could not be punished by the Maryland courts, for they would not have violated any Maryland statute, and the Maryland courts cannot punish for a violation of a Virginia statute. No State can execute the penal laws of another.

The grounds of error alleged by the petitioners cannot be supported in law or fact, and they should be remanded to the custody of the sheriff of Accomack county, Virginia, and suffer the penalty of their crimes.

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